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(18543)

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 59.

SARAH A. HIBBEN,
Plaintiff in Error,
vs.
WILLIAM C. SMITH, JOSEPH H. PATTISON AND WILLIAM F. CHURCHMAN, PARTNERS TRADING AS THE FINANCIAL EXCHANGE; THE FINANCIAL EXCHANGE AND JOSEPH H. PATTISON,
Defendants in Error.

IN ERROR to the Supreme Court of the State of Indiana.

BRIEF FOR PLAINTIFF IN ERROR.

MURAT W. HOPKINS,
RUSSELL T. MacFALL,
MERRILL MOORTS,
Solicitors and Counsel for Plaintiff in Error.

INDEX.

	Pages.
Statement of Case	1–8
Complaint	2
Answer, Second Paragraph, and demurrer	3
Answer, Third Paragraph, and demurrer	3–4
Answer, Fourth Paragraph, and demurrer	4–7
Cross-complaints and demurrers	7–8
Judgment	8
Appeal to State Supreme Court	8
Ruling of State Supreme Court	8
Errors Relied Upon	8–12
Brief of Argument	13–76
Indiana Statute	14
Points for Argument and Authorities	15–22
Argument	23–76
Indiana Rule of Special Assessments	23–26
The Assessment, a Judicial Function	26–33
Arbitrary Assessment Not Due Process of Law	33–51
Due Process of Law	35
Controls Taxing Power	41–48
Town Board Not Judicial Body	48
Other Assessments in Indiana	49
Judges Disqualified by Interest	51–76
Maxims	52
Interest of Town Board	57
Interest Disqualifies	58–67
Tax Payers Disqualified	68
Jurors Disqualified	69
Necessity Not Sufficient	71
Waiver and Collateral Attack	72
Summary	75
Table of Cases	77
Appendix	i

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STATEMENT OF CASE.

This case was orignally brought in the Superior Court of Marion County, Indiana, by William C. Smith to enforce upon eight lots and a part of an unplatted tract of twenty acres of land belonging to plaintiff in error, the lien of an assessment for the improvement of the roadway of Washington street, in the Town of Irvington, Indiana.

The complaint (Rec., p. 1) was in the usual form, and included as an exhibit a part of the Town Engineer's estimate roll, from which it appeared that the benefits had been estimated by the engineer, and assessed by the town board at a uniform rate of $3.54 per foot fronting on the improvement. A demurrer to the complaint by plaintiff in error was overruled. (Rec., p. 5.) This ruling was the first error assigned in the State Supreme Court. (Rec., p. 61.)

Answer was then filed. The second paragraph of answer (Rec., p. 6) alleged that the improvement was made and the lien sought to be enforced in accordance with the provisions of an act of the General Assembly of the State of Indiana, approved March 8th, 1889, and amendments thereto, being Sections 4288 to 4299, both inclusive, of the Revised Statutes of 1894, and also alleged that said acts and each section thereof were null and void because contrary to the Fourteenth Amendment to the Constitution of the United States. The trial court sustained a demurrer to this paragraph of answer (Rec., p. 32), and this was included in the second assignment of error in the State Supreme Court. (Rec., p. 61.)

The third paragraph of answer (Rec., p. 7) set out verbatim all the ordinances and proceedings of the Board of Town Trustees relating to the improvement, viz.: The resolution declaring the necessity for the improvement, and directing the making of the same (Rec., pp. 7, 35); the resolution accepting the bid (Rec., pp. 11, 37); the contract and bond (Rec., pp. 12, 38); the report and estimate of the Town Engineer (Rec., pp. 19, 43); the final substituted report of the committee on streets to which was referred the Engineer's report and estimate (Rec., pp. 23, 45); the final assessment by the Board of Town Trustees (Rec., pp. 25, 46).

It is also alleged (Rec. pp. 24. 46); "That on such hearing before said committee on streets, alleys and contracts, and on the hearing before said Board of Trustees, no hearing was had upon, and no consideration was given, to the question of

whether or not the abutting property or any part thereof was specially benefited in an amount equal to, less than, or in excess of the amounts fixed by the assessments in said engineer's report; that at no time did said committee or said board consider or determine, or attempt to consider or determine, or to give or have any hearing upon the amount of special benefit to any of the lands or lots abutting upon said improvement; that all the acts and proceedings of said board hereinbefore set out were had and done, and that said hearings before said committee and before said board were had, and said assessments were made and confirmed upon the theory and belief on the part of said board and of the members thereof that the statutes of the state and the said ordinance and resolution of February 23, 1898, and the subsequent ordinances of said board, and the contract for said improvement established the rule for assessments at the same fixed price per lineal front foot on each side for the whole improvement, and that no change could be made therein by said board; that said committee and said board refused at such hearing to hear or consider any objection to said engineer's report, and the assessments therein, based upon any inquiry into the amount of special benefit accruing to any abutting lot or parcel of land."

"That said substitute report (Rec. pp. 23, 45) was adopted and that thereupon on the said 26th day of April, 1899, the said board, by ordinance, accepted said improvement and adopted and approved such engineer's report, and approved and confirmed the assessments set forth in such engineer's report, which approval and confirmation was in the words and figures following, to-wit:" (See Rec., pp. 25, 46.)

It also alleged (Rec., pp. 26, 28, 47, 51) "that all the members of said board of trustees of said Town of Irvington were residents of said town and taxpayers thereof; that two members of said board, towit: Hilton U. Brown and J. C. Barnhill were the owners of lots abutting upon said improvement and assessed therefor at said rate of $3.54 per lineal

front foot, and by reason of such interest were not competent to fix and determine the amount of actual special benefits accruing to the real estate abutting upon such improvement."

It further alleged (Rec., pp. 26, 30, 48, 50) that plaintiff in error brought action to enjoin the making of the improvement on the same day the contract therefor was awarded for the reason that said improvement would confiscate said property, and that said action is still pending.

It further alleged (Rec., p. 26) that all the said acts, ordinances and proceedings of the Board of Town Trustees were null and void because opposed to and in violation of Section one of the Fourteenth Amendment to the Constitution of the United States.

A demurer to this paragraph of answer was sustained (Rec., p. 32) and this was included in the second assignment of error in the State Supreme Court. (Rec. p. 61.)

The fourth paragraph of answer (Rec., p. 27) recited in detail the proceedings by the Board of Trustees without quoting them verbatim, contained the same allegations as the second paragraph in regard to the hearing accorded plaintiff in error and the theory upon which the assessments were made and the same allegations as to the interest of the trustees and alleged further as to the character of the improvement and its value to the lands and lots of plaintiff in error. (Rec., pp. 29, 51.)

That the total frontage of the defendant's land upon said improvement was 1,529.52 feet, and that the said town clerk in accordance with said ordinance, placed upon the town tax duplicate an assessment against defendant's said lands of $3.54 per lineal front foot, making a total of $5,414.50. Said defendant further says that the said street so improved is of the aggregate length of five thousand, one hundred, twenty-six and fifteen hundredths (5,126.15) feet; that on the east of said improvement said street is improved with macadam for a distance of about 1,760 feet to the east line of the said town

of Irvington; that on the west of said improvement the said Washington street is wholly unimproved for a distance of about 5,115 feet to the improvements in the city of Indianapolis, and that such unimproved portion is much worn and often in bad condition; that the said improved portions of Washington street are a portion out of what is called the National Road, which is a public highway, extending from beyond the city of Indianapolis on the west through the country far to the east of the said town of Irvington; that said highway is much used by the general public for travel and traffic from and to points east and west of said town of Irvington; that a considerable portion of the travel along and over said improvement is by all the citizens of Irvington or to or from said town of Irvington; and but a small part of the travel along and over said improvement is to or from the property abutting thereon or by the owners of said abutting property; that a large proportion of the real estate fronting on said improvement is unimproved and is beyond the part of said town of Irvington, where real estate is being improved; and is beyond that part of said town where improvements are likely to be made, and that there is no market for said real estate at this time, and there are no prospects that it can be sold in the near future for the purpose of being built upon and improved; that the street improvements described in plaintiff's complaint added nothing to the value of a large part of the real estate fronting upon said improvement; that said improvement is of no special benefit or advantage to said defendant or to the other owners of the abutting property along the line thereof; that the said defendant and the other abutting property owners derive no more benefit from such improvement than the other residents of said town and the general public throughout said county of Marion; that of the real estate belonging to this defendant, viz., lots 53, 54, 55, 56, 57, 58, 59 and 60, are unimproved and unoccupied; that there is no sale or market for such lots at this time, and there is no

probability of there being in the near future any sale or market for said lots or for any of them for improving or building purposes, or for any purpose by which said improvement of Washington street would be of any advantage to or add to the value of said lots or any of them; that said improvement does not add to the value of said lots or any of them; that said lots 53, 54, 55, 56, 57, 58 and 59 were of the value of four hundred dollars each; and that the assessment against said lots is in substantial, to-wit: $141.60 on each lot, excess of the special benefits received or which will be received by said lots; that said lot 60 is of the value of three hundred dollars, and that the assessment against said lot 60 is in substantial, to-wit: $327.45, excess of the benefits received or which will be received by said lot; that the land belonging to this defendant and described in plaintiff's complaint as part W. ½ of S. W. ¼ Sec. 3–15–4, is an irregular tract of 20.55 acres, lying in the northwest part of the corporate limits of said town of Irvington having a frontage of one thousand, one hundred, fifty-seven and two hundredths (1,157.02) feet on the north side of Washington street, and a depth of about 1,237 feet; that said real estate is not platted into lots, and there is no market or sale for said tract of land or any part thereof for building purposes, nor is there any prospect that there will be any such market or sale for said real estate or any part thereof in the near future; that the only value of said real estate is for pasturage, and that the said improvements of Washington street are of no special or peculiar advantage or benefit to said tract whatever, and that said improvements add nothing to the value of said tract of 20.55 acres; that said tract was of the value of twenty thousand dollars, and that the assessment against said tract is in substantial, to-wit: $4,095.85, excess of the special benefit received or which will be received by said tract from said improvement.

"It further alleges (Rec., pp. 30, 53) that by reason of the acts of said town Board of Trustees in passing said ordinance declaring the necessity for and providing for said improvement of Washington street, and in approving and confirming the engineer's report and the assessments made therein on the 26th day of April, 1899, and by each and every act of said board connected with or relating to said improvement, the defendant's property is taken without compensation and without due process of law, and that all of the said acts of said board and each of said acts is contrary to and in violation of the constitution and laws of the State of Indiana, and contrary to and in violation of the Constitution of the United States of America, and particularly of the first section of the fourteenth amendment to the Constitution of the United States of America.

" Wherefore, defendant, Sarah A. Hibben, prays that said assessment be declared void and that defendant have judgment for costs."

To this paragraph of answer a demurrer was sustained by the trial court (Rec., p. 32), and this ruling was included in the second assignment of error in the State Supreme Court. (Rec., p. 61.)

Plaintiff in error also filed cross-complaint, the first, second and third paragraphs of which were substantially the same as the second, third and fourth paragraphs of answer respectively. (Rec., pp. 33, 34, 49.) The cross-complaint asked that the collection of the assessments be enjoined and the title of plaintiff in error be quieted. (With the specific references to the record under the second, third and fourth paragraphs of answer we have included the corresponding references to the first, second and third paragraphs of cross-complaint.)

A demurrer to the cross-complaint was sustained (Rec., p. 54), and this was the third error specified in the State Supreme Court. (Rec., p. 61.)

The plaintiff in the trial court dismissed so much of his complaint as sought to foreclose a lien against the unplatted ground, and plaintiff in error refusing to plead further a decree was rendered foreclosing the lien as against the eight lots for the assessments, interest, costs and attorney's fees and directing sale to satisfy the same. (Rec., p. 56.)

From this judgment plaintiff in error appealed to the Supreme Court of Indiana, assigning as errors the overruling of the demurrer to the complaint, and the sustaining of the demurrers to the answers and the cross-complaints. (Rec., pp. 59, 61.)

The Supreme Court of the State affirmed the judgment of the court below. (Rec., p. 63.)

A petition for rehearing was overruled. (Rec., p. 66.)

ERRORS RELIED UPON.

The assignment of errors in this court is as follows: (Rec., p. 72.)

First. The Supreme Court of Indiana erred in affirming the judgment and decree of the Superior Court of Marion County, Indiana.

Second. The Supreme Court of Indiana erred in overruling appellant's petition for a rehearing.

Third. The Supreme Court of Indiana erred in holding that the act of the General Assembly of the State of Indiana approved March 8, 1889, being Chapter CXVIII of the laws of the State of Indiana passed at the fifty-sixth regular session of the General Assembly, published in the Acts of 1889,

at page 237, and all acts amendatory thereof, being Sections 4288 to 4299, both inclusive, of Burns' Revision of the Statutes of Indiana of 1894, afforded to appellant due process of law, and that they were not opposed to and in contravention of the Constitution of the United States.

Fourth. That the Supreme Court of Indiana erred in holding that the ordinances, acts and proceedings of the town board of trustees of the Town of Irvington afforded to appellant due process of law, and that they were not opposed to and in contravention of the Constitution of the United States.

Fifth. The Supreme Court of Indiana erred in holding that the assessments upon appellant's lots were levied by due process of law, as guaranteed by the Constitution of the United States.

Sixth. The Supreme Court of Indiana erred in holding that, although the State law gave to the board of town trustees exclusive and final jurisdiction of the apportionment of assessments for street improvements, and required said board to judicially apportion such assessments upon the basis of actual special benefits, yet the refusal of such board of town trustees to give to appellant a hearing upon the amount of special benefits accruing to her lots and its refusal to permit appellant to introduce evidence as to the amount of actual special benefits accruing to her lots, did not deny to appellant due process of law, as guaranteed by the Constitution of the United States.

Seventh. The Supreme Court of Indiana erred in affirming the ruling and judgment of the Superior Court of Marion County, Indiana, sustaining the demurrer of said William C. Smith to the third and fourth paragraphs of appellant's answer and the second and third paragraphs of appellant's cross-complaint, and to each of said paragraphs of answer and of cross-complaint, which paragraphs of answer and of

cross-complaint, each, alleged that the acts, ordinances and proceedings of the said board of town trustees, and the said assessments made by said board of trustees, did not afford appellant due process of law as guaranteed by the Constitution of the United States for the reason that said board of trustees refused to give to appellant a hearing upon the question of the amount of actual special benefits accruing to her said lots and refused to hear or permit appellant to introduce evidence as to the amount of actual special benefits accruing to her said lots.

Eighth. The Supreme Court of Indiana erred in holding that although the State law gave to the board of town trustees exclusive and final jurisdiction of the apportionment of assessments for street improvements, and required said board to judicially apportion such assessments upon the basis of actual special benefits, yet the assessment and apportionment of actual special benefits upon appellant's lots by a town board of trustees, all of the five members of which were residents and taxpayers of the town and two of the members of which owned lots and lands abutting upon the same improvement and at the same time assessed therefor by said board, afforded to appellant due process of law, as guaranteed by the Constitution of the United States.

Ninth. The Supreme Court of Indiana erred in affirming the ruling and judgment of the Superior Court of Marion county, Indiana, in sustaining the demurrer of the said William C. Smith to the third and fourth paragraphs of appellant's answers and the second and third paragraphs of appellant's cross-complaint and to each of said paragraphs of said answer and said cross-complaint, which paragraphs of answer and of cross complaint, each alleged that the acts, ordinances and proceedings of said board of town trustees, and the assessments made by said board of town trustees did not afford

to appellant due process of law as guaranteed by the Constitution of the United States for the reason that all of the five members the board of town trustees which fixed and levied the assessments of actual special benefits upon appellant's lots were residents and taxpayers of said town, and that two of said members owned lands and lots abutting upon the same improvement, and at the same time assessed therefore by said board.

Tenth. The Supreme Court of Indiana erred in holding that a State law which requires assessments for street improvements to be apportioned upon the basis of the actual special benefits, and which provides no method by which such benefits could or might be judicially fixed or determined, afforded to appellant due process of law, as guaranteed by the Constitution of the United States.

Eleventh. The Supreme Court of Indiana erred in holding that the arbitrary levy for a street improvement of an assessment in substantial excess of the actual special benefits, which levy was not made according to any prescribed or recognized statutory method, afforded to appellant due process of law, as guaranteed by the Constitution of the United States.

Twelfth. The Supreme Court of Indiana erred in affirming the ruling and judgment of the Superior Court of Marion county, Indiana, in sustaining the demurrer of the said William C. Smith to the fourth paragraph of appellant's answer and the second and third paragraphs of appellant's cross-complaint, which paragraphs of answer and cross-complaint, each alleged that the assessments against appellant's lots and each of them were not made and levied by due process of law as guaranteed by the Constitution of the United States for the reason that said assessments and each of them were in

substantial excess of the actual special benefits accruing therefrom, and that said assessments were not made and levied according to any prescribed or recognized statutory method.

BRIEF OF ARGUMENT.

This action was originally brought to foreclose the lien of a local assessment for improving a street with curb and brick roadway. Plaintiff in error by her second paragraph of answer and first paragraph of cross-complaint (Rec. pp. 6, 33) alleged that the State law was invalid because it took her property without due process of law, thereby contravening the Fourteenth Amendment to the Constitution of the United States. By her third paragraph of answer and second paragraph of cross-complaint (Rec. pp. 7, 34) she attacked the constitutionality of the town ordinances in reference to the improvement upon the same ground, and by her fourth paragraph of answer and third paragraph of cross-complaint (Rec. pp. 27, 49) she attacked the constitutionality of the assessment itself upon the same ground.

The specific objection to the statute is that, while it grants to plaintiff in error a so-called hearing upon the question of actual special benefits, as it must do to be valid under the rule in Indiana, it does not provide for such a hearing as will constitute due process of law, but that it leaves the determination of the special benefits to an exercise of arbitrary power by the board of town trustees.

The specific objections to the ordinances and to the assessments are:

(1) That they are made not according to law, but by an exercise of arbitrary power (Rec. pp. 24, 28, 46, 50).

(2) That they were made by trustees having a direct pecuniary interest in the amount of the assessment antagonistic to the interest of plaintiff in error (Rec. pp. 26, 28, 47, 51), and

(3) That the assessment was in substantial excess of the special benefit accruing to the property of plaintiff in error (Rec. pp. 29, 47, 52).

The street improvement law in question, commonly known as the "Barrett Law," is in brief as follows:

Section one provides that the work may be ordered and done either upon petition or upon vote of the board of trustees and that the town shall have a lien for the cost thereof upon the lands and lots on the street.

Section two provides for a resolution of necessity, hearing thereon and notice thereof.

(It is held that this hearing is wholly advisory and not jurisdictional. *Hughes* v. *Parker*, 148 Ind. 692.)

Section three provides how the costs shall be apportioned, for the lien, for foreclosure of the lien and the extent of the town's liability. See appendix, p. i.

Section four provides for credit to property owners for improvements already made and for bonds by the contractors.

Section five provides for partial estimates and for payments by the town. See appendix, p. ii.

Section six provides for final report and estimate by the town engineer. See appendix, p. iii.

Section seven provides hearings and notices thereof, final assessment and the lien thereof and for payment of assessments in ten annual installments. See appendix, p. iv.

Section eight provides for issue and sale of bonds, and the lien thereof.

Section nine provides for the issue of certificates or bonds direct to the contractor, the lien thereof and of its foreclosure. See appendix, p. vi.

Section ten provides for collection by the town itself by way of precept and for appeal from such precept to the circuit court.

POINTS FOR ARGUMENT.

The claims of plaintiff in error are as follows:

First. In Indiana assessments for local street improvement are based upon and measured by the actual special benefits accruing to the land or lots assessed.

City of New Albany *v.* Cook, 29 Ind., 220;
Adams *v.* City of Shelbyville, 154 Ind., 467;
McKee *v.* Town of Pendleton, 154 Ind., 652;
DeFrees *v.* Ferstl, 154 Ind., 695, 696;
City of Indianapolis *v.* Holt, 155 Ind., 222, 240;
Taylor *v.* City of Crawfordsville, 155 Ind., 403, 405;
Schaefer *v.* Werling, 156 Ind., 704;
Shank *v.* Smith, 157 Ind., 401;
Leeds *v.* DeFrees, 157 Ind., 392;
Wray *v.* Fry, 158 Ind., 92;
Marion Bond Co. *v.* Johnson, 29 Ind. App., 294;
Klein *v.* Nugent Gravel Co. (Ind. App.), 66 N. E., 486.

Second. The determination of the actual special benefits is a judicial function.

Black on Judgts., §§ 290, 291;
Cooley Const. Lim. (6″ Ed.), 108;
Cooley on Taxation, 265, 266;
Elliott on Mun. Corp., 130;
Elliott Roads and Streets (2d Ed.), §§ 281, 564;
Van Fleet, Coll. Att., § 16;
Brown *v.* City of Denver, 7 Col., 305, S. C.; 3 Am. & Eng. Corp. Cas., 630;
Flournoy *v.* City of Jeffersonville, 17 Ind., 169;
City of Ft. Wayne *v.* Cody, 43 Ind., 197;
Campbell *v.* Dwiggins, 83 Ind., 473;

Sunier *v.* Miller, 105 Ind., 393;
Harman *v.* Moore, 112 Ind., 227;
Garvin *v.* Daussman, 114 Ind., 429;
Kuntz *v.* Sumption, 117 Ind., 1;
Campbell *v.* Board of Com., 118 Ind., 119;
Barber, etc. Co. *v.* Edgerton, 125 Ind., 455;
Thompson *v.* Goldthwait, 132 Ind., 20;
Guckien *v.* Rothrock, 137 Ind., 355;
Adams School Twpt. *v.* Irwin, 150 Ind., 12;
Kirsch *v.* Braun, 153 Ind., 247;
Town of Greenwood *v.* Lawson (Ind.), 64 N. E., 849, 850;
Motz *v.* City of Detroit, 18 Mich., 495;
Thomas *v.* Gain, 35 Mich., 155;
Whiteford Tp. *v.* Probate Judge, 53 Mich., 130;
Overing *v.* Foote, 65 N. Y., 263;
Stuart *v.* Palmer, 74 N. Y., 183;
City of Phila. *v.* Miller, 49 Pa. St., 440;
Santa Clara *v.* Southern Pacific R. R. Co., 13 Am. & Eng. R. R. Cas., 182;
Meyers *v.* Shields, 61 Fed., 713, 728;
Murray's Lessee *v.* Hoboken Land and Improvement Co., 18 How., 272, 284;
Hagar *v.* Reclamation District No. 108, 111 U. S., 701, 710;
Dewey *v.* Des Moines, 173 U. S., 193.

Third. Due process of law as guaranteed by the 14th Amendment to the Constitution of the United States requires that the property of plaintiff in error be not taken away by an arbitrary act of the board of trustees of Irvington.

Magna Charta;
Petition of Rights, 1 Car. I, c. 1;
Bill of Rights, 1 W. & M. Sess. 2, c. 2;

Stamp Act;
Journal Confederative Congress, Vol. XII, p, 58;
Journal of Congress, Vol. 1, p. 28, Ed. Phil. 1800;
Ordinance of 1787, Art. 4;
4 Black. Com., 424;
Broom Max. (8th Am. ed.), 113;
2 Coke Inst., p. 46;
Cooley Const. Lim. (6th Ed.), 35, 104, 429, 599;
Cooley on Taxation (2d Ed.), 674;
2 Kent. Com. (11th Ed.) 2, Note, 3, 6;
Story on Const. vol. 2, § 1789;
Boswell's Case, 6 Rep., 52 a;
Bagg's Case, 11 Rep., 93 b. 99 a;
Prohibition del Roy, 12 Rep., 63;
Rex *v.* Chancellor of Cambridge (Dr. Bentley's Case), 1 Strange, 557;
Rex *v.* Beun, 6 T. R., 198;
Harper *v.* Carr, 7 T. R., 266, 270;
Rex *v.* Geskin, 8 T. R., 209;
Capel *v.* Childs, 2 Cromp. & Jer., 558, 574;
Bonaker *v.* Evans, 16 Q. B., 162, 170;
In re Hammersmith Rent Charge, 4 Exch., 87, 97;
Graham *v.* Furber, 14 C. B., 134, 165 (78 E. C. L. R.);
Reg. *v.* Archbishop of Canterbury, 1 E. & E., 545, 559 (102 E. C. L. R.);
Cooper *v.* Board of Works, 108 E. C. L. R., 181.
In re Brook, 16 C. B. N. S. 403, 416 (111 E. C. L. R.);
Reg. *v.* Saddler's Co., 10 H. L. Cas., 404;
Zeigler *v.* S. & N. Ala. R. R. Co., 58 Ala., 594;
Klein *v.* Nugent Gravel Co., 66 N. E. 486 (Ind. App.);
Jones Co. *v.* Perry, 26 Ind. App., 554;
Campbell *v.* Dwiggins, 83 Ind., 473;
Lipes *v.* Hand, 104 Ind., 503, 507;
Heick *v.* Voight, 110 Ind., 279, 285;

Wilkins *v.* State, 113 Ind., 514;
Kuntz *v.* Sumption, 117 Ind., 1;
State *v.* Noble, 118 Ind., 350, 366, 370;
Langenberg *v.* Decker, 131 Ind., 471;
People *v.* Chase, 165 Ill., 527;
Freeland *v.* Hastings, 10 Allen, 570, 575;
Whitcomb Case, 120 Mass., 118;
Paul *v.* Detroit, 32 Mich., 108, 118;
Sanborn *v.* Fellows, 22 N. H., 473;
Stuart *v.* Palmer, 74 N. Y., 183;
Ex parte Logan Branch Bank, 1 Ohio St., 432;
State *v.* Guilbert, 56 Ohio St., 575;
Harmon *v.* State, 66 Ohio St., 249;
Railroad Tax Cases, 13 Fed., 722, 734, 751, 755;
Calder *v.* Bull, 3 Dallas, 388;
Bank of Columbia *v.* Okely, 4 Wheat., 235, 244;
McCullough *v.* State of Maryland, 4 Wheat., 316, 427;
Van Ness *v.* Pacard, 2 Pet., 137, 144;
Murray's Lessee *v.* Hoboken Land Etc. Co., 18 How., 272;
McVeigh *v.* United States, 11 Wall., 259;
State Tax on Foreign Held Bonds, 15 Wall., 300, 319;
Galpin *v.* Page, 18 Wall., 350, 368;
Windsor *v.* McVeigh, 93 U. S., 274;
Pearson *v.* Yewdall, 95 U. S., 294;
Davidson *v.* New Orleans, 96 U. S., 97, 104;
Hurtado *v.* California, 110 U. S., 516, 536;
Hagar *v.* Reclamation District No. 108, 111 U. S., 701, 708;
Hovey *v.* Elliott, 167 U. S., 409;
French *v.* Barber Asphalt Paving Co., 181 U. S. 324;

Fourth. Due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States requires that no man shall be judge in his own cause.

Bacon's Abr. "Jury" M., 3;
Bouvier Law Dict., tit., Judge;
1 Brooks Abr., 177, tit. conusans, 27;
Broom. Max. (8th Am. Ed.), 116, 120;
Burns Justice, III, 132;
C. 3, 5, 1;
Coke, Litt., 141 a, Sec. 212;
Com. Dig., 101, 4, Justices, I, 3;
Cooley Const. Lim. (6th ed.), 506;
Domat's Public Law, lib. 2, tit. 1, sec. 2, 14;
Elliott on Mun. Corp., § 130;
Freeman on Judgments (4th ed.), §§ 144, 145, 147;
4 Inst., 71;
Just. Code, lib. 1, tit. 1, 16;
Littleton, § 212;
Pandects, pars. II, lib. 5, 17;
Pothier's Pro. Civ., C. 2, Sec. 5;
Rolle, Abr. Judges, Pl. 11;
14 Vin. Abr., 573, Pl. 28;
Voet. ad. Pand. lib. 5, tit. 1, 43;
Jenk. 40, case 76; 90, case 74;
Bonham Case, 8 Coke, 212, 219, 224;
Earl of Derby's Case, 12 Coke, 114;
Day *v.* Savadge, Hob., 85;
Anonymous, 1 Salk., 396;
Great Charte *v.* Kensington, 2 Str., 1173;
Hasketh *v.* Braddock, 3 Burr., 1847;
Queen *v.* Com. for Cheltenham, 1 A. and E. N. S., 468;
Reg. *v.* Justices of Surrey, 21 L. J. M. C., 195;
Esdaile *v.* Lund, 12 M. & W., 734;
Queen *v.* Justices of Hertfordshire, 6 Q. B., 753;
Reg. *v.* Upton St. Leonard's, 10 Q. B., 827; (59 E. C. L. R.);

Reg. *v.* Aberdare Canal Co., 14 Q. B., 853; (68 E. C. L. R.);
Queen *v.* Justices of Suffolk, 18 Q. B., 416;
Regina *v.* Justices, 14 Eng. L. and Eq., 93;
Dimes *v.* Grand Junction Canal, 3 H. L. Cas., 759, 793;
Ranger *v.* Great Western Ry. Co., 5 H. L. Cas., 72, 88, 89;
State *v.* Castleberry, 23 Ala., 85;
Heydenfeldt *v.* Towns, 27 Ala., 423;
Heilbron *v.* Campbell, 23 Pac. Rep., 122 (Cal.);
North Bloomfield Gravel Min. Co. *v.* Keyser, 58 Cal., 315;
Donnelly *v.* Howard, 60 Cal., 291;
Lent *v.* Tillson, 72 Cal., 404, 428;
City of Oakland *v.* Oakland Water Front Co., 118 Cal., 249;
Meyer *v.* City of San Diego, 121 Cal., 102;
Ramish *v.* Hartwell, 126 Cal. 443;
Hadley *v.* Dague, 130 Cal., 207;
Hawley *v.* Baldwin, 19 Conn., 585;
Appeal of Nettleton, 28 Conn., 268;
Ochus *v.* Shelden, 12 Fla., 138;
Ex Parte Harris, 26 Fla., 77; S. C., 23 Am. St. Rep., 548;
State *v.* Young, 31 Fla., 594;
Klein *v.* Tuhey, 13 Ind. App., 74;
Hern *v.* City of Greensburg, 51 Ind., 119;
Hudson *v.* Wood, 52 N. E., 612 (Ind. App.);
Board of Com. of Fountain Co. *v.* Loeb, 68 Ind., 29;
Shoemaker *v.* Smith, 74 Ind., 71, 75;
Fechheimer *v.* Washington, 77 Ind., 366;
Town of Albion *v.* Hetrick, 90 Ind., 545, 549;
Bradley *v.* City of Frankfort, 99 Ind., 417;
Block *v.* State, 100 Ind., 357;

Pearcy *v.* Mich. Mutual Life Ins. Co., 111 Ind., 59;
Chicago & Atlanta Ry. Co. *v.* Summers, 113 Ind., 10;
Zimmerman *v.* State, 115 Ind., 129;
Markley *v.* Rudy, 115 Ind., 533;
City of Goshen *v.* England, 119 Ind., 368;
Bass *v.* City of Ft. Wayne, 121 Ind., 389;
Board of Com. Carroll Co. *v.* Justice, 133 Ind., 89;
Board *v.* Heaston, 144 Ind., 583;
Chicago & E. R. Co. *v.* City of Huntington, 149 Ind., 518;
Adams *v.* City of Shelbyville, 154 Ind., 467;
Gaff *v.* State, 155 Ind., 277;
Clifford *v.* York Co. Com., 59 Me., 262;
Buckingham *v.* Davis, 9 Md., 324;
Gay *v.* Minot, 3 Cush., 352, 354;
Inhabitants of North Hampton *v.* Smith, 11 Metc. (Mass.), 390;
Tolland *v.* County Com., 13 Gray, 12;
Pearce *v.* Atwood, 13 Mass., 324;
Taylor *v.* County Com. of Worcester, 105 Mass., 225;
Hall *v.* Thayer, 105 Mass., 219;
Ames *v.* Port Huron Log Driving & Booming Co., 11 Mich., 139;
Peninsula R. R. Co. *v.* Howard, 20 Mich., 18, 25;
Stockwell *v.* Township Board of White Lake, 22 Mich., 341;
Paul *v.* Detroit, 32 Mich., 108, 117;
Galbreath *v.* Newton, 30 Mo. App., 380;
Russell *v.* Perry, 14 N. H., 152;
Sanborn *v.* Fellows, 22 N. H., 473;
Moses *v.* Julian, 45 N. H., 52;
Stearns *v.* Wright, 51 N. H., 600, 610;
State *v.* Newark, 1 Dutcher, 399, 405;
Peck *v.* Freeholders of Essex, 21 N. J. L., 656;

Schroder *v.* Ehlers, 31 N. J. L., 44;
State et. al. *v.* Crane, 36 N. J. L., 394;
Traction Co. *v.* Board of Works, 56 N. J. L., 431;
Foster *v.* Cape May, 60 N. J. L., 78, 82;
Washington Ins. Co. *v.* Price, 1 Hopk. Ch., 1;
Oakley v. Aspinwall, 3 N. Y., 547;
Converse *v.* McArthur, 17 Barb. 410, 411;
Edwards *v.* Russell, 21 Wend., 64;
Diveny *v.* City of Elmira, 51 N. Y., 506;
White *v.* Connelly, 105 N. C., 65;
Gregory *v.* Cleveland R. R. Co., 4 O. St., 675;
Schroder *v.* Overman, 61 Ohio St. 1;
Conklin *v.* Squire, 29 Weekly Law Bull., 157;
City of Guthrie *v.* Shaffer, 7 Okl., 459;
Cleveland *v.* Tripp, 13 R. I., 50;
Wetzel *v.* State, 5 Tex. Civ. App., 17;
Templeton *v.* Giddings, 12 S. W. Rep., 851 (Tex.);
Chambers *v.* Hodges, 23 Tex., 104;
Taylor *v.* Williams, 26 Tex., 583;
State *v.* City of Cisco (Tex. Civ.,) 33 S. W., 244;
Austin *v.* Nalle, 85 Tex., 520;
Barnett *v.* Ashmore, 5 Wash. St., 163;
Findley *v.* Smith, 42 W. Va., 299;
Jefferson Co. *v.* Milwaukee Co., 20 Wis., 139;
Case *v.* Hoffman, 100 Wis., 314, 351;
Meyers *v.* Shields, 61 Fed., 713, 723;
Aultman & Taylor Co. *v.* Brumfield, 94 Fed., 423;
Calder *v.* Bull., 3 Dallas, 386, 388;
Pennoyer *v.* Neff, 95 U. S., 714, 733;
Wight *v.* Davidson, 181 U. S., 371;

ARGUMENT.

First. In Indiana assessments for local street improvements are based upon and measured by the actual special benefits accruing to the land or lots assessed.

This principle was laid down in the early case of *City of New Albany* v. *Cook*, 29 Ind., 220, and was repeated many times afterwards, but up to 1889 the State courts followed the authorities that held that the legislature might conclusively determine the method of measuring the special benefits. The frontage rule was adopted in 1852 and for many years it was fairly satisfactory. Under the conditions of urban growth and improvement it was probably as just a method as any. But it developed that this method often worked great hardship and not infrequently it operated to confiscate property because the assessment was greater than the value of the property after the improvement was made. Two causes contributed to this result. First, the sudden development of electrical communication by way of trolley cars and telephones broke up the compact growth of cities and towns, destroyed the uniformity of values and stimulated the suburbs of towns and small cities. Second, this change of conditions greatly stimulated municipal improvements and the Middle West entered upon a wild and unreasoning era of street improvements that has stretched out hundreds of miles of beautiful brick roadway and cement sidewalks through fields of wheat and corn and has confiscated hundreds of thousands of dollars' worth of property. The front foot method no longer approximated justice. To meet the requirements of the change the General Assembly of Indiana in 1889 enacted the law now before this court. The front foot rule was not wholly abandoned, but it was made the *prima facie* rule only. It provided in section seven that the *prima facie* front foot assessment should be changed to the actual

special benefits after a judicial hearing of evidence by the board of town trustees and that such a hearing, or an opportunity for such a hearing of the property owners was essential to the validity of the assessment.

The present rule in Indiana and the only rule that can be supported upon principles of justice and right, is stated in the case of *Adams* v. *City of Shelbyville*, 154 Ind., 467, as follows:

"We conclude, therefore, that the principles applicable to assessments for local improvements are these: The legislature may create or authorize a municipality to create a local taxing district for local improvement purposes, which includes part only of the property within the municipality. The legislature may declare conclusively that only the property within the taxing district shall be specially assessed on account of local improvement within that district. Each parcel of contributing property may be assessed only to the extent that it actually receives special benefits. The taxing district, as a whole, may be assessed only to the extent of the sum of the special benefits actually received by the several parcels of contributing property. The improvement, so far as its cost exceeds the special benefits resulting to the several parcels of property in the taxing district, is a benefit to the municipality at large and such excess must be borne by the general treasury. Property owners affected by an improvement within a taxing district are entitled to a hearing on the question of special benefits. * * * * * * * * * * * The published notice calls attention of all persons affected that the report of the engineer is before the council for consideration, and that the same is subject to such alterations as the council may deem just in adjusting the several assessments to the basis of actual benefits and all persons concerned are bound to know that the *prima facie* assessments against their property are liable to be increased as well as decreased. * * * * * * * * * * * * * * * * * On the other hand, if we read section three as providing a basis for assessments which shall be *prima facie* correct and which shall be held to be true and correct assessment until assailed by the property owner and shown upon a hearing by

a preponderance of proof or found to be unjust and altered and amended by the common council of its own motion, then we find sections 3, 6 and 7 in complete harmony, each effective and in accord with the other provisions of the act. * * * We therefore conclude that section 3, Acts 1889 (section 4290, Burns' Rev. St., 1894) must be construed as providing a rule of *prima facie* assessments in street and alley improvements, which allotments by the city or town engineer, under section 6 of said Act of 1889 (section 4293, Burns' Rev. St., 1894) are subject to review and alteration by the common council and board of trustees under section 7 of said Act of 1889 as amended (Acts 1891, p. 324; acts 1899, p. 64, Burns' Rev. St., 1894, § 4294) upon the basis of actual special benefits received by the improvement; and that under section 7 the common council of a city or board of trustees of an incorporated town have not only the power, but it is their imperative duty, to adjust the assessments for street and alley improvements, under said act, to conform to the actual special benefits accruing to each of the abutting property owners."

The same doctrine has been affirmed and followed by the subsequent Indiana cases as the only theory upon which the law was constitutional.

McKee v. *Town of Pendleton*, 154 Ind., 652;
DeFrees v. *Ferstl*, 154 Ind., 695, 696;
City of Indianapolis v. *Holt*, 155 Ind., 222, 240;
Taylor v. *City of Crawfordsville*, 155 Ind., 403, 405;
Schaefer v. *Werling*, 156 Ind., 704;
Gorman v. *State ex rel. Koester*, 157 Ind., 205;
Shank v. *Smith*, 157 Ind., 401;
Leeds v. *DeFrees*, 157 Ind., 392;
Wray v. *Fry*, 158 Ind., 92;
Marion Road Co. v. *Johnson*, 29 Ind. App., 294;
Klein v. *Nugent Gravel Co.*, (Ind. App.); 66 N. E., 486.

In the case at bar (reported in 158 Ind., 206, Rec. p. 64,) the court quoted from *Leeds* v. *DeFrees*, *Supra*, as follows:

"The statute in question, as shown, provides a tribunal for that purpose, and further provides that an aggrieved person shall have the right to appear before it and be accorded a hearing on his objections to the proposed assessment. The power to hear the complaint of the aggrieved owner carries with it such implied power as will make the hearing effectual; for the rule is well settled that, when a general power is granted by a statute, every necessary power for the effectual exercise thereof is given by implication." (Citing authorities.)

"Possessing such general power under the statute, the council certainly had the right, upon a hearing, to award adequate and effectual relief by ultimately apportioning the cost of the improvement to the several pieces of property according to the benefits resulting to each on account of the improvement. It is true that the statute provides what may be considered as *prima facie* evidence of the benefits received by abutting property, but such standard or evidence is not conclusive, as the council has the right to so apportion the cost as to make it conform to the benefits derived."

Second. The determination of the actual special benefits is a judicial function.

Speaking of the judicial powers of government Mr. Cooley in his work on Constitutional Limitation (6th Ed., p. 108), says:

"The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes, the law. And it is said that that which distinguishes a judicial from a legislative act is, that the one is a determination of what the existing law is in relation to some existing thing already done or happened, while the other is a predetermination of what the law shall be for the regulation of all future cases falling under its provisions. And in another case it is said: The legislative power ex-

tends only to the making of laws, and in its exercise it is limited and restrained by the paramount authority of the Federal and State Constitutions. It cannot directly reach the property or vested rights of the citizen by providing for their forfeiture or transfer to another, without trial and judgment in the courts; for to do so would be the exercise of a power which belongs to another branch of the government, and is forbidden to the legislative. That is not legislation which adjudicates in a particular case, prescribes the rule contrary to the general law, and orders it to be enforced. Such power assimilates itself more closely to despotic rule than any other attribute of government."

So long as the legislature determined conclusively in advance that the special benefits were measured by the frontage there was no exercise of judicial power. The amount of the assessment was fixed by mathematical measurements and calculations thereon. There was a fiction that making the assessment was a judicial or a quasi judicial act to justify the corresponding fiction that the assessments represented the special benefits.

The nature of the hearing adapted to the different circumstances was well stated in *Garvin* v. *Daussman*, 114 Ind., 429. The Court said:

"It is without doubt essential to the validity of every law under which proceedings may be had for the taking of property, or to impose a burden upon it which may result in taking it, that the law make provision for giving some kind of notice at some stage in the proceeding, and that it afford the owner an opportunity to be heard concerning the legality of the assessment, before some tribunal or body authorized to correct errors, or give appropriate relief, before the property is taken or the charge made absolute. * * * The Constitution sanctions no law imposing such an assessment, without a notice to, and a hearing or an opportunity of a hearing by the owners of the property to be assessed. It is not enough that the owners may by chance have notice, or that they may as a matter or favor have a hearing. The law

must require notice to them, and give them the right to a hearing and an opportunity to be heard." *Stuart* v. *Palmer*, 74 N. Y., 183.

* * * "The fact must, however, be kept in view that the notice and hearing which the constitution demands need only be such as are adapted to the nature of the assessment proposed, and such as afford to each individual affected the opportunity to show that, according to the method prescribed by competent authority for making the assessment, the amount charged against him is incorrect. In the imposition of poll or occupation taxes, where a certain sum is assessed against each individual exercising a given avocation, or according to his age, without regard to actual benefits, the necessity of notice and a hearing is reduced to a minimum. To a measurable extent, the same principle is involved when the cost of an improvement is, as by law in proper cases it may be, apportioned by mere mathematical calculation, according to a certain rate per front foot." * * * * "In judging what is due process of law, respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law.' If the law directing the proceedings affords the property owner an opportunity to be heard, after due notice, in a tribunal competent to afford him relief appropriate to the nature of the case, so that the charge against his property only becomes conclusive after the opportunity for a hearing has been had, it cannot be said that his property has been taken or burdened without due process of law." * * * * "The legislature may commit to the common council of a city, or to a tribunal specially provided for the purpose, the power of apportioning the cost of an improvement, and of assessing the expense thereof, upon the property benefited in the manner provided by law, unless the method prescribed is plainly unadapted to arriving at a fair and equitable result, and, also, to determine what property within the limits defined, if any are defined, will be benefited by the improvement. In respect to all such

questions, the determination of the common council or other body, within the limits of the jurisdiction specially committed to it, may be made conclusive."

But under the present rule the frontage assessments are only "*prima facie* correct, and which shall be held to be the true and correct assessments until assailed by the property owner, and shown upon a hearing by a preponderance of proof." Now, "property owners affected by an improvement within a taxing district are entitled to a hearing on the question of special benefits."

Such a hearing is wholly of a judicial sort and quite different from those hearings of an administrative sort where an officer is required to act or refuse to act after a showing of the existence or non-existence of a certain state of facts.

Here plaintiff in error is entitled to have the assessments against her lots limited by the special benefits accruing to them. She is entitled to a hearing as to the amount of such benefits. She is entitled to introdnce on such hearing the evidence of persons competent to estimate the amount of such benefits. She is entitled to hear and cross-examine the witnesses upon the same question offered by other property owners and by the town. Presumably she is entitled to have all the proof given under oath, to have the aid of process to enforce the attendance of witnesses in her behalf. The law has not in terms provided for these matters, but the State Supreme Court has said either directly or by inevitable inference, that the law implies them. Last, but not least, the State Supreme Court has said that the plaintiff in error is entitled to have the amount of the assessment fixed, ascertained and determined "by a preponderance of proof," and not by arbitrary authority, not upon an arbitrary basis, whether that of frontage, area or value. She was entitled to have the proof heard under reasonable rules and restrictions and to have this proof weighed and considered by an impartial tribunal, and to have the assessment fixed according

to the preponderance thereof, and according to the law as enacted by the legislature and as construed by the State Supreme Court. All this is as purely judicial as the functions of this honorable Court in hearing this writ of error. But she had none of these. (Rec. pp. 24, 28, 46, 50.)

Elliott, in his work on Municipal Corporations, says of the exercise of the right of Eminent Domain by municipalities: "It is necessary that some impartial tribunal exercising judicial power be provided for assessing the damages to be awarded. It may consist of a court, a court and jury, or commissioners selected by the court." (Sec. 130.)

In a case similar to this one the court said:

"The law imposed upon him (the County Auditor) the duty of hearing and weighing evidence, and rendering a decision upon it. This necessarily involved the exercise of judicial discretion."

Meyers v. *Shields*, 61 Fed. Rep., 713–728.

Of the character of such acts the court said, in *Flournoy* v. *City of Jeffersonville*, 17 Ind., 169: "The judicial power of this State is vested in courts. A judicial act, then, must be an act performed by a court touching the rights of parties, or property, brought before it by voluntary appearance, or by the prior action of a ministerial officer; in short, by ministerial acts." * * * "A ministerial act may, perhaps, be defined to be one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to, or the exercise of, his own judgment upon the propriety of the act being done."

In the case of *City of Fort Wayne* v. *Cody*, 43 Ind., 197, the Court held that the question of benefits for a sewer could not be reviewed by the Court, for the reason that the power of determining the benefits was vested in the Council; that it acted judicially and that its determination was final.

The right of a board of equalization to increase an individual valuation, and of a county auditor to increase gravel

road assessments without due notice, was denied on the ground that they were judicial acts, and that due process of law required notice and a hearing.

Kuntz v. *Sumption*, 117 Ind., 1;
Campbell v. *Board of Com.*, 118 Ind., 119.

In the case of *Barber, etc. Co.* v. *Edgerton*, 125 Ind., 455, it was sought to enjoin a street improvement made under the Barrett Law. It was decided that Sections 6 and 7 gave a constitutional hearing. "Assessments to pay for the improvement are made upon the assumption that the property affected is benefited in a sum equal to the cost. But whether such improvement does or does not benefit the property in a sum equal to its cost, is essentially a judicial question, upon which the property owner is entitled to notice and a hearing. Elliott, Roads and Streets, p. 397."

The case of *Thompson* v. *Goldthwait*, 132 Ind., 20, was a proceeding to locate a free gravel road. Held, that the duties of the viewers were judicial and that they must be disinterested.

Guckien v. *Rothrock*, 137 Ind., 355, was a ditch assessment case. Held, that the Auditor could not increase the assessment. Making or increasing the amount was a judicial act. If made by the Auditor it was void, because he was a ministerial officer. If made by the commissioners it was void, because no notice was given. "The Auditor cannot determine the benefits nor, indeed, any other purely judicial question. * * * It would, at all events, deprive the land owners of the constitutional right to have benefits assessed by due process of law."

The court held in *Dewey* v. *Des Moines*, 173 U. S., 193, that a State cannot, by legislation or judicial action, make a non-resident personally liable to pay an assessment for a local improvement because to do so would be to render a per-

sonal judgment against a person over whom the State and its courts had no jurisdiction, the assessment having the force of a judgment of a court. To the same effect see *Hagar* v. *Reclamation District No. 108*, 111 U. S., 701, 710, and note; *Stewart* v. *Palmer*, 74 N. Y., 186; *Leeds* v. *DeFrees*, 157 Ind., 392; *Town of Greenwood* v. *Lawson*, (Ind.); 64 N. E., 849, 850.

In this case the Supreme Court of Indiana decided that the assessment made by the town board of Irvington was a judgment, with all the incidents of the judgment of a court. The court said:

"So long as the board of trustees keeps within the limits of its jurisdiction, its decision or judgment in the premises must be held to be binding and conclusive on all persons concerned until set aside or annulled by some direct proceeding known to the law, based on reasons or grounds which the law recognizes as sufficient for that purpose. *City of Ft. Wayne* v. *Cody*, 43 Ind., 197; *Anderson* v. *Baker*, 98 Ind., 587; *Sunier* v. *Miller*, 105 Ind., 393; 4 N. E., 867; *Garvin* v. *Dausman*, 114 Ind., 429; 16 N. E., 826; 5 Am. St. Rep., 637; *Motz* v. *City of Detroit*, 18 Mich., 495; *Harman* v. *Moore*, 112 Ind., 227; 13 N. E., 718; *School Tp.* v. *Irwin*, 150 Ind., 12; 49 N. E., 806; *Kirsch* v. *Braun*, 153 Ind., 247; 53 N. E., 1082; Black, Judgm., §§ 290, 291. The doctrine seems to be well settled that in order to render a judgment of a court or other tribunal invested with power to decide in a matter void, so as to open such judgment to a collateral attack, an absence must be shown of either, first, a legal organization of the tribunal; or, second, jurisdiction over the subject-matter; or, third, jurisdiction over the person; or, fourth, one or more of these matters must appear to have been lost after it or they once existed. Van Fleet, Coll. Attack, § 16.

Whether or not it is a judicial hearing depends upon the nature of the proceeding, the end to be attained and the recognized methods of attaining them. The legislature cannot make it judicial or non-judicial by arbitrary fiat.

As was said in *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 How., 272, 284:

"To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider Congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admirality; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination."

Third. Due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States requires that the property of plaintiff in error be not taken away by an arbitrary act of the Board of Trustees of Irvington.

We first note that the assessment was in substantial excess of the special benefits. (Rec. pp. 29, 47, 52.) One lot worth $300 was assessed $327.45. This is confiscation. The other lots, worth $400 each, were assessed $141.60 each, without any special benefit accruing. This was partial confiscation. About ⅛ of the unplatted ground was assessed $4,095.85 without any special benefit. This would approximate total confiscation. Plaintiff in error has not rested upon the bare allegation of the conclusions of fact, that her property was not specially benefited. It appears from the answer and cross-complaint (Rec. pp. 29, 51) that Irvington is a small suburb of the City of Indianapolis, and that communication is had between the two over Washington street, the street improved, which is the designation for that part of the old National Road, a through east and west highway, embraced in the limits of the said city and town; that Washington street is improved with macadam from the east line of Irvington west a distance of about ⅓ of a mile to the brick improvement in controversy, which extends westward nearly one mile. From the west end of the brick roadway Washington street or the National road is unimproved for about one mile, when the improvements of the City of Indianapolis commence. We would expect a great deal of through travel

along this highway between Irvington and Indianapolis, and between points beyond them. Much of the unimproved and unoccupied land usually found between a city and a suburban town was along this mile long improvement. The plaintiff in error owned along this part of the street eight vacant and unimproved lots. They were in that part of the town that was undeveloped and unimproved. The street in front of them served only as a means of communication between other points. No one traveled it coming to or going from these lots. The town was not improving or developing about them, hence the improvement added very little, if anything, to their prospective or speculative value. And as to the frontage of 1157.02 feet of the 20 acre tract, assessed at $4,095.84, the same facts were true. Its only present use was as a cow pasture. A brick roadway adds but little to the value of a cow pasture. Situated as it was, the roadway added but little to its prospective or speculative value.

The answers and cross-complaints disclose the occasion of this unjust and inequitable assessment. (Rec. pp. 24, 28, 46, 50.) It was not a mistake or error of judgment as to the facts on the part of the assessing tribunal. The board of town trustees did not give or grant a hearing as the law required; it refused to hear proof that the *prima facie* front foot assessment was unjust; it did not in any wise consider or inquire into the actual special benefits; it did not make the final assessment according to any law of Indiana, but it arbitrarily confirmed as the assessment, the *prima facie* estimate of the engineer at $3.54 per front foot upon all the property abutting upon the improvement; and this arbitrary action confiscated all the value of a part of the lands and lots belonging to the plaintiff in error, and a substantial part of the value of her other lands and lots, all without due process of law, and contrary to the Fourteenth Amendment to the Constitution of the United States.

The guarantee of "due process of law" or "the law of the land" is a guarantee against the exercise of arbitrary power.

Freedom from arbitrary power is the chief and fundamental maxim of Angle Saxon and Constitutional government.

Audi alteram partem.

No man shall be condemned unheard.

Broom. Max. (8th Am. ed.), 113;
In re Brook, 16 C. B. N. S., 416. (111 E. C. L. R.)
In re Hammersmith Rent Charge, 4 Exch., 97;
Reg. v. *Archbishop of Canterbary*, 1 E. & E. 559 (102 E. C. L. R.);
Reg. v. *Saddler's Co.*, 10 H. L. Cas., 404;
Boswell's Case, 6 Rep., 52 a.
Graham v. *Furber*, 14 C. B., 134, 165 (78 E. C. L. R.);
Prohibition del Roy, 12 Rep. 63;
Capel v. *Childs*, 2 Cromp. & Jer., 558;
Bonaker v. *Evans*, 16 Q. B., 162;
Bagg's Case, 11 Rep., 93 b., 99 a;
Rex v. *Chancellor, etc. of Cambridge* (*Dr. Bentley's Case*), 1 Strange, 557;
Rex v. *Beun*, 6 T. R., 198;
Harper v. *Carr*, 7 T. R., 270;
Rex v. *Geskin*, 8 T. R., 209.
Story on Const., vol. 2, § 1789.

Mr. Cooley, in his work on Constitutional Limitations (6th Ed., p. 431), says:

"Perhaps no definition is more often quoted than that given by Mr. Webster in the Dartmouth College case: 'By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities, under the protection of the general rules which

govern society. Everything which may pass under the form of an enactment is not therefore to be considered the law of the land.' The definition here given is apt and suitable as applied to judicial proceedings, which cannot be valid unless they proceed upon inquiry and render judgment only after trial. It is entirely correct, also, in assuming that a legislative enactment is not necessarily the law of the land. The words 'by the law of the land,' as used in the constitution, do not mean a statute passed for the purpose of working the wrong. That construction would render the restriction absolutely nugatory and turn this part of the constitution into mere nonsense. The people would be made to say to the two houses: 'You shall be vested with the legislative power of the State, but no one shall be disfranchised or deprived of any of the rights or privileges of a citizen, unless you pass a statute for that purpose. In other words, you shall not do the wrong unless you choose to do it.' When the law of the land is spoken of, 'undoubtedly a pre-existing rule of conduct' is intended, not an *ex-post facto* rescript or decree made for the occasion. The design is to exclude arbitrary power from every branch of the government and there would be no exclusion if such rescripts or decrees were to take effect in the form of a statute."

See 4 Black. Com., 424;
2 Kent. Com. (11th Ed.), 2, note 3;
Campbell v. *Dwiggins*, 83 Ind., 473;
Harmon v. *State*, 66 Ohio St., 249;
Railroad Tax Cases, 13 Fed., 722, 751, 755;
State Tax on Foreign Held Bonds, 15 Wall., 300, 319;
Davidson v. *New Orleans*, 96 U. S., 97, 104;
Hagar v. *Reclamation District No. 108*, 111 U. S., 701, 708.

As was said by Mr. Justice Johnson, of this court, in the case of *Bank of Columbia* v. *Okely* (4 Wheat., 235, 244):

"As to the words from Magna Charta incorporated in the Constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind

has at length settled down to this, that they were intended to secure the individual from the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice."

The constitutional guaranty extends to the protection of individual cases against the arbitrary action of the courts.

Hovey v. *Elliott*, 167 U. S., 409.

In this case Mr. Justice White said:

"Can it be doubted that due process of law signifies a right to be heard in one's defence? If the legislative department of the government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever of being heard, would it be pretended that such an enactment would not be violative of the Constitution? If this be true, as it undoubtedly is, how can it be said that the judicial department, the source and fountain of justice itself, has yet the authority to render lawful that which if done under express legislative sanction would be violative of the Constitution? If such power obtains, then the judicial department of the government, sitting to uphold and enforce the Constitution, is the only one possessing a power to disregard it. If such authority exists, then, in consequence of their establishment to compel obedience to law and to enforce justice, courts possess the right to inflict the very wrongs which they are created to prevent. In *Galpin* v. *Page*, 18 Wall., 350, the court said (p. 368): 'It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court; by which is meant, until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and can never be upheld when justice is justly administered.'"

The court, the town board of Irvington, had no legislative authority to make the assessment without a hearing and consideration of the actual benefits. It acted without its jurisdiction, and its judgment was void.

In *McVeigh* v. *United States*, 11 Wall., 259, on writ of error to the United States District Court, Mr. Justice Swayne said:

"In our judgment the District Court committed a serious error in ordering the claim and answer of the respondent to be stricken from the files. As we are unanimous in this conclusion, our opinion will be confined to that subject. The order in effect denied the respondent a hearing. It is alleged that he was in the position of an alien enemy, and hence could have no *locus standi* in that forum. If assailed there, he could defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice." Citing *Calder* v. *Bull*, 3 Dallas, 388; *Bonaker* v. *Evans*, 16 A. & E. N. S., 170; *Capel* v. *Childs*, 2 Compton & Jervis, 574.

In the case of *Windsor* v. *McVeigh*, 93 U. S., 274, growing out of the same controversy, Mr. Justice Field, after quoting the above language, said:

"The principle stated in this terse language lies at the foundation of all well-ordered systems of jurisprudence. Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court, pronounced against a party without hearing him or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal.

"That there must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights, is admitted. Until notice is given, the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be by the law of its organization, over the subject matter. But notice is only for the purpose of affording the party an opportunity of being heard upon the claim or the charges made; it is a summons to him to appear and speak, if he has

anything to say, why the judgment sought should not be rendered. A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether. It would be like saying to a party, Appear and you shall be heard; and when he has appeared, saying, Your appearance shall not be recognized and you shall not be heard. In the present case the District Court not only in effect said this, but immediately added a decree of condemnation, reciting that the default of all persons had been duly entered. It is difficult to speak of a decree thus rendered with moderation; it was, in fact, a mere arbitrary edict, clothed in the form of a judicial sentence.

"The law is, and always has been, that whenever notice or citation is required, the party cited has the right to appear and be heard; and when the latter is denied, the former is ineffectual for any purpose. A denial to a party in such a case of the right to appear is in legal effect the recall of the citation to him. The period within which the appearance must be made and the right to be heard exercised is, of course, a matter of regulation, depending either upon positive law, or the rules or orders of the court, or the established practice in such cases. And if the appearance be not made, and the right to be heard be not exercised, within the period thus prescribed, the default of the party prosecuted, or possible claimants of the property, may, of course, be entered, and the allegations of the libel be taken as true for the purpose of the proceeding. But the denial of the right to appear and be heard at all is a different matter altogether."

In *Zeigler* v. *S. & N. Ala. R. R. Co.*, 58 Ala., 594, the Court said:

"Due process of law implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty or property, in its most comprehensive sense; to be heard by testimony or otherwise and to have the right of controverting, by proof, every material fact which bears on the question of

right in the matter involved. If any question of fact or liability be conclusively presumed against him, this is not due process of law."

In *Paul* v. *Detroit*, 32 Mich., 108, 118, it was held that a city charter which required that the jury when sworn, shall "go to the place of intended improvement and upon, or as near as may be practicable, to any property intended to be taken, and described in said notice, and after carefully inspecting the same, shall return at once to the court and first determine the necessity of making the improvement and of using the property intended to be taken therefor, and if they shall find in the affirmative, they shall in open court next hear evidence and objection relating thereto, and determine the award, etc.," to be unconstitutional because an essential fact was found without an actual hearing.

This court has held that the Federal guaranty of due process of law does not require that special assessments for local improvements be levied according to the actual special benefits, because (a) the constitution does not specifically so provide, and (b) because "the law of the land" of England, and of the colonies before the formation of the Constitution did not recognize any such necessity, but sanctioned the collection of such charges by summary process in the nature of a distress warrant.

French v. *Barber Asphalt Paving Co.*, 181 U. S., 324.

This court there said, on page 330, quoting from *Murray's Lessee* v. *Hoboken Land Co.*, 18 How., 272;

"The Constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free

to make any process 'due process of law' by its mere will. To what principles, then, are we to resort to ascertain whether this process, enacted by Congress, is due process? To this the answer must be twofold. We must examine the Constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the immigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country."

Such a method of collecting assessments for local improvements might have been due process of law a hundred years ago because adapted to the nature of the case, but it is not generally recognized as due process of law to-day, because under the present industrial conditions it violates the constitutional guaranty against arbitrary exactions. The Federal constitution does not extend to forms of taxation, but it does extend to the fundamental principles upon which the right of taxation depends.

In *Van Ness.* v *Pacard*, 2 Pet., 137, 144, Mr. Justice Story said:

"The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their situation."

And those principles were the same and were as well recognized a hundred years ago as they are to-day. And one of the fundamental maxims was that taxes should not be levied and collected arbitrarily. What the legislature establishes must not violate any of the fundamental maxims of our form of government. The Federal constitution regulates the exercise of the taxing power as certainly as any other.

It was against the arbitrary exercise of the taxing power that both the English people and the American colonies made their earliest and most vigorous claims to the protection of the law of the land.

See Magna Charta;
The Petition of Rights, 1 Car., I c. 1;
Bill of Right, 1 W. & M. sess. 2 c. 2;
Stamp Act;
Journal of Congress, vol. 1, p. 28, Ed. Phil., 1800;
Ordinance of 1787, Art. 4;
Journal Confederate Congress, vol. XII, p. 58;
2 Coke Inst., p. 46;
4 Black. Com., 424;
Cooley Const. Lim., 35, 429, 599, 605, 606, 610, 612, 615, 617, 635, 638;
2 Kent. Com. (11th Ed.), 3 note, 6;
McCullough v. *State of Maryland*, 4 Wheat., 316, 427;
Freeland v. *Hastings*, 10 Allen, 570, 575;
The Railroad Tax Cases, 13 Fed., 722, 734, 751, 757, 764.

In the last cited case, at page 733, Mr. Justice Field said of the control of the Federal constitution over the State power of taxation:

"Unequal exactions in every form, under any pretense, are absolutely forbidden; and of course unequal taxation, for it is in that form that oppressive burdens are usually laid. It is not possible to conceive of equal protection under any system of laws when arbitrary and unequal tax is permissible; when different persons may be taxed on their property of the same kind, similarly situated at different rates."

Mr. Sawyer, C. J., in his concurring opinion in this case, page 763, quoted and approved the following from *Stewart* v. *Palmer*, 74 N. Y., 183:

"The legislature can no more arbitrarily impose an assessment for which property may be taken or sold than it can render a judgment against a person without a hearing. It is a rule founded on the first principles of natural justice, older than written constitutions, that a citizen shall not be deprived of his life, liberty or property without an opportunity to be heard in defense of his rights; and the constitutional provision that no person shall be deprived of these without due process of law, has its foundation in this rule. This provision is the most important guaranty of personal rights to be found in the Federal or State constitutions. It is a limitation upon arbitrary legislation. No citizen shall arbitrarily be deprived of his life, liberty or property. This the legislature cannot do, nor authorize to be done. 'Due process of law' is not confined to any judicial proceedings, but extends to every case which may deprive a citizen of his life, liberty or property, whether the proceedings be judicial, administrative or executive in its nature. This great guaranty is always and everywhere present to protect the citizen against arbitrary interference with these sacred rights.

"No case, it is believed, can be found in which it was decided that the constitutional guaranty did not extend to cases of assessments, and yet we may infer from certain dicta of judges that their attention was not called to it, or that they lost sight of it in the cases which they were considering. It has sometimes been intimated that a citizen is not deprived of his property, within the meaning of this constitutional provision, by the imposition of an assessment. It might as well be said that he is not deprived of his property by a judgment entered against him.

"It is a principle which underlies all forms of government by laws that a citizen shall not be deprived of life, liberty or property without due process of law. The legislature has no power to take away any man's property, nor can it authorize its agents to do so, without first providing for personal notice to be given to him, and for a full opportunity of time, place and tribunal to be heard in defense of his rights. This constitutional guaranty is not confined to judicial proceedings, but extends to every case in which a citizen may be deprived of life, liberty or property, whether the proceeding be judicial, administrative or executive in its nature."

The Circuit Judge further says:

"In *Cooper* v. *Board of Works*, 108 Eng., C. L. R., 181, in which was in question the action of the board of public works in pursuance of a statute which did not require notice, Willes, J., said: 'I apprehend that a tribunal, which is by law invested with power to affect the property of one of her majesty's subjects, is bound to give such subject an opportunity of being heard before it proceeds; and that that rule is of universal application, and founded upon the plainest principle of justice.' In the same case, Byles, J., said: 'The judgment of Mr. Justice Fortescue, in *Dr. Bentley's Case*, is somewhat quaint, but it is very applicable, and has been the law from that time to the present. He says: 'The objection for want of notice can never be got over. The laws of God and man both give the party an opportunity to make his defense, if he has any. I remember to have heard it observed by a very learned man, upon such an occasion, that even God himself did not pass sentence upon Adam before he called upon him to make his defense. 'Adam, where art thou? Hast thou not eaten of the tree whereof I commanded thee that thou shouldst not eat?'"

"In *Davidson* v. *New Orleans*, 96 U. S., 97, it was not questioned, but assumed, that the party taxed must have an opportunity to be heard, and decided upon that theory. In my judgment the authorities establish beyond all controversy that somewhere in the process of assessing a tax under a law, or a State constitution, at some point before the amount of the assessment becomes finally and irrevocably fixed, the statute or the State constitution must provide for notice to be given to the owner of the property taxed, and an opportunity be afforded to make objections and to be heard upon them. In some form or manner he must be afforded an opportunity to defend his interests. In this case the constitution makes no provision for notice or a hearing, and the answer alleges that there was none, which is admitted by the demurrer."

See *Hagar* v. *Reclamation District No. 108*, 111 U. S., 701, 708 and 710, and notes on pages 712 and 713.

In this case Mr. Justice Field said:

"It is sufficient to observe here that by 'due process' is meant one which, following the forms of law, is appropriate to the case and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. The clause in question means, therefore, that there can be no proceeding against life, liberty or property which may result in the deprivation of either without the observance of those general rules established in our system of jurisprudence for the security of private rights. *Hurtado* v. *California*, 110 U. S., 516, 536.

"But where the taking of property is in the enforcement of a tax, the proceeding is necessarily less formal, and whether notice to him is at all necessary may depend upon the character of the tax and the manner in which its amount is determinable. The necessity of revenue for the support of the government does not admit of the delay attendant upon proceedings in a court of justice, and they are not required for the enforcement of taxes or assessments. As stated by Mr. Justice Bradley, in his concurring opinion in *Davidson* v. *New Orleans:* 'In judging what is 'due process of law' respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvement, or some of these; and if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law,' but if found to be arbitrary, oppressive and unjust, it may be declared to be not 'due process of law.' Of the different kinds of taxes which the State may impose, there is a vast number of which, from their nature, no notice can be given to the taxpayer, nor would notice be of any possible advantage to him, such as poll taxes, license taxes (not dependent upon the extent of his business), and generally, specific taxes on things, or persons, or occupations. In such cases the legislature, in authorizing the tax, fixes its amount, and that is the end of the matter. If the tax be not paid, the property of the delinquent may be sold, and he be thus deprived of his

property. Yet there can be no question that the proceeding is due process of law, as there is no inquiry into the weight of evidence, or other element of a judicial nature, and nothing could be changed by hearing the taxpayer. No right of his is, therefore, invaded. Thus, if the tax on animals be a fixed sum per head, or on articles a fixed sum per yard, or bushel, or gallon, there is nothing the owner can do which can affect the amount to be collected from him. So, if a person wishes a license to do business of a particular kind, or at a particular place, such as keeping a hotel or a restaurant, or selling liquors, or cigars, or clothes, he has only to pay the amount required by the law and go into business. There is no need in such cases for notice or hearing. So also, if taxes are imposed in the shape of license for privileges, such as those on foreign corporations for doing business in the State, or on domestic corporations for franchises, if the parties desire the privilege, they have only to pay the amount required. In such cases there is no necessity for notice or hearing. The amount of the tax would not be changed by it.

"But where a tax is levied on property not specifically, but according to its value, to be ascertained by assessors appointed for that purpose upon such evidence as they may obtain, a different principle comes in. The officers in estimating the value act judicially, and in most of the states provision is made for the correction of errors committed by them, through boards of revision of equalization, sitting at designated periods provided by law to hear complaints respecting the justice of the assessments. The law in prescribing the time when such complaints will be heard, gives all the notice required, and the proceeding by which the valuation is determined, though it may be followed, if the tax be not paid, by a sale of the delinquent's property, is due process of law."

In a case somewhat like this one, a writ of error to the Supreme Court of Pennsylvania was dismissed for the reason that "ample provision is made for an inquiry as to damages before a competent court, and for a review of the proceedings of the court of original jurisdiction upon an appeal

to the highest court of the State. This is due process of law, within the meaning of that term as used in the Federal Constitution." *Pearson* v. *Yewdall*, 95 U. S., 294.

In the late case of *Klein* v. *Nugent Gravel Co*, 66 N. E., 486, the Appellate Court of Indiana held a complaint to foreclose a street improvement lien insufficient because the assessment was arbitrarily levied by the town officers. The court said:

"The authority of a city to improve streets and levy assessments against abutting real estate for the payment of such improvements, is conferred by statute and the general rule prevails that the provisions of the statute should be followed. The right of a municipality to lay a burden upon private property for a public improvement rests upon the theory that such property thereby derives a benefit equal to the burden imposed. Cooley on Taxation (2d Ed.,) 674; *Jones Co.* v. *Perry*, 26 Ind., App., 554, 57 N. E., 583. It is both the spirit and letter of the law that all property abutting upon a street improved shall bear its proportionate burden of the costs, according to the benefits accruing. The statute never intended to place within the arbitrary power of a city council the right to assess lots and parcels of land fronting or abutting on one side of a street to the exclusion of lots on the opposite side and thus place the burden of the costs of the improvements wholly upon property upon one side. The costs of the improvement assessed against a lot on one side might not be the same as that assessed against a lot on the opposite side for the reason that the benefits accruing might not be equal."

Plaintiff in error is not relying upon a guaranty of the Federal Constitution that the assessments upon her lots shall be levied upon the basis of frontage, area, value, or of actual special benefits, but upon a guaranty of the Federal Constitution that the assessments upon her lots shall not be levied by an exercise of arbitrary power. She does not ask this court to hold that the assessment upon her property is void because levied upon a rigid frontage basis, although she con-

ceives that the court might readily extend the constitutional guaranty thus far, but she does ask this court to hold void the assessments arbitrarily levied by the town board of trustees, in a method not authorized or directed by any state law. The situation is the same as if the statute required assessments to be made upon the frontage basis, and the board of trustees had made the assessment upon the basis of area.

We suggest in this connection that the assessment was not only arbitrarily made, but that the statute provided for an arbitrary assessment, not according to "the law of the land," as generally recognized by the courts and the legislatures.

First. The statute gives to the board of town trustees exclusive judicial power, thus violating the fundamental principle of republican government that the three departments of government shall be kept separate.

Cooley Const. Lim. (6th Ed.), 104;
People v. *Chase*, 165 Ill., 527
(Torren's Land Law Case);
State v. *Guilbert*, 56 Ohio St., 575;
Ex parte Logan Branch Bank, 1 Ohio St., 432;
Whitcomb Case, 120 Mass., 118;
Sanborn v. *Fellows*, 22 N. H., 473;
Langenberg v. *Decker*, 131 Ind., 471;
State v. *Noble*, 118 Ind., 350, 366, 370.

As to the right of a board of equalization to increase a valuation without specific notice, the court said, in the case of *Kuntz* v. *Sumption*, 117 Ind., 1, in denying the right: "Judicial powers are, as we have said, in the case cited (*Wilkins* v. *State*, 113 Ind., 514), lodged in courts and when the constitution distributes the judicial power, it can only be exercised by the tribunals named by the constitution and constituted as the constitution provides." (Citing cases.)

It has been held that the legislature could confer upon the board of trustees the power to make the assessments for street improvements. But that was under the old front foot

rule. This might have been due process of law when the duties of the trustees were judicial in form rather than in substance; but under the rule of actual benefits their duties are eminently judicial, both in form and substance, and their hearing does not afford due process of law.

It has also been held that a surveyor or trustee, a board of trustees or of commissioners, may make a provisional or contingent assessment of actual special benefits, but with the exception of the Barrett law, no statute or decision in Indiana attempts to make an assessment of actual special benefits final and conclusive until made or reviewed fully by a properly and legally constituted judicial tribunal acting according to the regular forms of judicial procedure, including the rights of change of venue and of appeal. These are rightly held to afford due process of law.

If the assessment is a judicial function, it cannot be made by either legislative or the executive department of government, nor by any branch of either. The board of town trustees is primarily a legislative body. The legislature may confer upon it certain functions of a judicial or *quasi* judicial character. It cannot, however, confer upon the town board duties of a purely judicial character and make the board's determination final and conclusive.

Second. The hearing granted by the statute does not afford "such safeguards for the protection of individual rights" as are "prescribed for the class of cases to which the one in question belongs" in Indiana.

In all other cases in Indiana where actual benefits or damages are to be determined, an appeal lies to the Circuit or Superior Court upon that question. In this case there is no appeal. In other cases, with very few exceptions, provision is made for securing a disinterested tribunal to determine the question in the first instance.

For illustrations, see the following sections of the Revised Statutes of Indiana, 1894:

Sec. 893, *et seq.*, for writ of assessment of damages.

Sec. 3582, *et seq.*, for harbor improvements.

Sec. 3597, *et seq.*, for sewer outlets.

Sec. 3607, for levees in cities.

Sec. 3629, *et seq.*, for opening, laying out or altering a street, alley, highway or water course.

Sec. 3834, *et seq.*, for condemnation of property in cities.

Sec. 3967, *et seq.*, for condemnation of property in cities of 50,000.

Sec. 4121, *et seq.*, for condemnation of property in cities of 35,000.

Sec. 4250, *et seq.*, for water works in cities and towns.

Sec. 4307, *et seq.*, for parks in cities and towns.

Sec. 4405, *et seq.*, for opening streets in towns.

Sec. 4429, *et seq.*, for sewers in towns. (There is no provision for an appeal, but in Section 4437 it is provided that in actions to enforce the lien the amount of actual benefits may be contested.)

Sec. 4646, *et seq.*, for property taken by bridge company.

Sec. 4704, *et seq.*, for cemeteries.

Sec. 4759, for right of way for gravel roads.

Sec. 4760, for material for gravel roads.

Sec. 4833, *et seq.*, for land taken by hydraulic company.

Sec. 5083, for land taken by canal company.

Sec. 5090, for land taken by water company.

Sec. 5105, for land taken by oil or gas company.

Sec. 5160, for land taken by railroad company.

Sec. 5274, for land taken by lateral railroad.

Sec. 5284, for land taken for extension of railroad.

Sec. 5417, for land taken by slack water navigation company.

Sec. 5436, for damming water course.

Sec. 5454, for land taken by street railroad.

Sec. 5501, for lands taken by telegraph companies.

Sec. 5523, for lands taken by telephone companies.

Sec. 5622, *et seq.*, for drainage.
Sec. 5631, for repairs of drains.
Sec. 5632, for allotment of drains for repairs.
Sec. 5655, *et seq.*, for drainage.
Sec. 5690, *et seq.*, for drainage.
Sec. 6555, *et seq.*, for taking up estrays.
Sec. 6610, for land taken for a ferry.
Sec. 6754, for opening highways.
Sec. 6807, for highways between counties.
Sec. 6830, for land damaged by improving highway.
Sec. 6865, for land taken for free turnpike.
Sec. 6869, for material taken to repair gravel road.
Sec. 6680, *et seq.*, for free gravel roads.
Sec. 6913, for material taken to build free pike.
Sec. 7216, *et seq.*, for levees and dykes.

Fourth. Due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States requires that no man shall be judge in his own cause.

An explanation of the injustice of the assessment upon the land and lots of plaintiff in error and of the arbitrary action of the board of trustees in making the assessments is found in the fact alleged in the answers and cross-complaints (Rec. pp. 26, 28, 47, 51), that all the five members of the board of trustees that made the assessments were resident taxpayers of the town and as such interested in having the entire cost paid by the abutting property owners, thereby relieving the town from any part of the cost, and in the further fact, so alleged, that Hilton U. Brown owned 1020 feet (Rec. pp. 21, 22, 44), and that J. C. Barnhill owned 60 feet on the same street, assessed at the same time at the same rate for the same improvement, and that Brown and Barnhill were members of the committee of three to which the engineer's estimate was referred (Rec. pp. 23, 45), and as such joined in the

report recommending that said estimate be approved, and that said Brown and Barnhill were members of the town board of trustees, Brown being President thereof (Rec. pp. 16, 41), and as such trustees aided and had a part in approving said report, aided and had a part in refusing to plaintiff in error and the other property owners a hearing upon the question of actual special benefits, and aided and had a part in arbitrarily disregarding the State laws, and assessing an arbitrary sum upon the property of plaintiff in error, greatly in excess of the actual benefits, and as such aided and had a part in confiscating the whole of lot 60, and a substantial part of the other lands and lots of plaintiff in error.

Plaintiff in error does not claim that the Federal guaranty of due process of law will not permit a board of town trustees to apportion and determine the special benefits of a local assessment. She claims only that the special benefits must be apportioned and determined by due process of law; that in fixing the forms of due process of law the legislature must have regard to certain established and recognized maxims of right that are guaranteed by the Federal Constitution; that one of these well recognized maxims is that no man shall be a judge in his own cause. This maxim is older than the English government, and was well recognized by the colonies before the adoption of the Constitution. It is essential to due process of law. It is crystallized in the old maxims of the law.

"*Aliquis non debet esse judex in propria causa, quia non potest esse judex et pars.*"

Coke, Litt., 141, a;
Broom. Max. (8 Am. Ed). 116;
Littleton, § 212;

Nemo debet esse judex in propria causa.
Earl of Derby's Case, 12 Coke, 114;
Broom. Max. (8 Am. Ed). 116;

Nemo potest esse simul actor et judex.
Broom. Max. (8 Am. Ed.) 116.

Nemo sibi esse judex vel suis jus dicere debet.
Earl of Derby's Case, 12 Coke, 114;
Cod. 3, 5, 1.
Broom. Max. (8 Am. Ed.) 116.

Because, *Nemo agit in seipsum.*
Jenk. Cent. Cas., 40.

For the authorities upon this proposition, see list cited on page 19 of this brief.

"*Si alter ex litigatoribus judicem solum heredem, vel ex parte fecerit, alius judex necessario summundus est; quia iniquum est, aliquem suae rei judicem fieri.*"

Pandects, pars, II, lib. 5, 17.

Which may be freely translated: If either of the litigants, or a party, shall have made a judge his sole heir, another judge is necessarily summoned, because it is abhorrent that any one should be judge in his own cause.

Mr. Cooley, in his work on *Constitutional Limitations*, at page 506 (6th Ed.), says:

"No one ought to be a judge in his own cause; and so inflexible and so manifestly just is this rule that Lord Coke has laid it down that 'even an act of Parliament made against natural equity, as to make a man a judge in his own case, is void in itself; for *jura naturae sunt immutabilia*, and they are *leges legum*.'

"This maxim applies in all cases where judicial functions are to be executed, and excludes all who are interested, however remotely, from taking part in their exercise. * * * It is not left to the discretion of the judge, or to his sense of decency, to decide whether he shall act or not; all his powers are subject to this absolute limitation; and when his own rights are in question, he has no authority to determine the

cause. * * * Accordingly, where the Lord Chancellor, who was a shareholder in a company in whose favor the Vice Chancellor had rendered a decree, affirmed this decree, the House of Lords reversed the decree on this ground, Lord Campbell observing: 'It is of the last importance that the maxim that 'no man is to be judge in his own cause' should be held sacred. And that is not to be confined to the cause in which he is a party, but applies to a cause in which he has an interest.' We have again and again set aside proceedings in inferior tribunals because an individual who had an interest in the cause took part in the decision. And it will have a most salutary effect on these tribunals, when it is known that this high court of last resort, in a case in which the Lord Chancellor of England had an interest, considered that his decree on that account, was a decree not according to law, and was set aside."

The language above quoted by Lord Campbell was used in the case of *Dimes* v. *Grand Junction Canal*, 3 H. L. C., 759, 793.

As to the due process of law referred to in the Fourteenth Amendment, Mr. Justice Field, in *Pennoyer* v. *Neff*, 95 U. S., 714, 733, said:

"Whatever difficulty may be experienced in giving to those terms a definition which will embrace every permissible exertion of power affecting private rights, and exclude such as is forbidden, there can be no doubt of their meaning when applied to judicial proceedings. They then mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit; and if that involves merely a determination of the personal liability of the defendant he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance."

In *Calder* v. *Bull*, 3 Dall., 386, 388, Mr. Justice Chase said:

"There are acts which the Federal, or State Legislature cannot do without exceeding their authority. There are certain vital principles in our free republican governments which will determine and overrule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty or private property for the protection whereof the government was established. An Act of the legislature (for I can not call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. The obligation of a law in governments established on express compact, and on republican principles, must be determined by the nature of the power on which it is founded. A few instances will suffice to explain what I mean. A law that punished a citizen for an innocent action, or, in other words, for an act which, when done, was in violation of no existing law; a law that destroys or impairs the lawful private contracts of citizens; a law that makes a man a judge in his own cause; or a law that takes property from A. and gives it to B. It is against all reason and justice for a people to entrust a legislature with such powers, and, therefore, it cannot be presumed that they have done it. The genius, the nature, and the spirit of our governments amount to a prohibition of such acts of legislation, and the general principles of law and reason forbid them. The legislature may enjoin, permit, forbid and punish; they may declare new crimes, and establish rules of conduct for all its citizens in future cases; they may command what is right, and prohibit what is wrong; but they can not change innocence into guilt, or punish innocence as a crime, or violate the right of an antecedent lawful private contract, or the right of private property."

It is not contended that the Federal guaranty will make void every local assessment made by a board of town trustees having such a direct pecuniary interest in the cause. In fixing the law of the land the legislature must have regard for

the constitutional maxim as applied to all the circumstances of the matter in hand. In *Campbell* v. *Dwiggins* (83 Ind., 473), the Supreme Court of Indiana held unconstitutional a statute regulating assessments for the repair of ditches and drains, saying:

"Due process of law requires an orderly proceeding adapted to the nature of the case in which the citizen has an opportunity to be heard and to defend, enforce and protect his rights. A hearing or an opportunity to be heard is absolutely essential. We cannot conceive of due process of law without this."

The circumstances of the present case are substantially as follows: The cost of this improvement was to be assessed upon the abutting property according to the actual special benefits, and this amount upon each piece of property was to be judicially determined after hearing and upon the basis of such proof as the owners might offer.

Adams v. *City of Shelbyville*, 154 Ind., 467.

The judgment of the town board making the assessment was absolute, final and conclusive. There was no appeal from their judgment as to the amount, and its accuracy could not be questioned or the amount altered in any other tribunal.

Klein v. *Tuhey*, 13 Ind. App., 74;
Chicago & E. R. Co. v. *City of Huntington*, 149 Ind., 518.

The proceeding prescribed by the State legislature was not "adapted to the nature of the case." It violated the constitutional right to have, at some stage of the proceedings, to levy and collect the assessment, an impartial tribunal, to hear evidence and fix the amount of the assessment. Of what avail is it to regard the constitutional requirement of a hearing and notice thereof, if no constitutional tribunal is provided, and no constitutional hearing had in the individual case?

It does not give plaintiff in error an impartial and constitutional tribunal to provide that Brown and Barnhill should sit as judges to finally hear, weigh and consider the proof offered by the other property owners, and to judicially and finally determine from such proof how much of the cost of the improvement should be borne by the grounds about Brown's home; how much should be borne by Barnhill's comparatively narrow lot in the heart of the town; how much should be borne by Sarah A. Hibben's vacant lots in the suburbs of the town; and how much should be borne by Sarah A. Hibben's cow pasture. For whatever part of the total cost is added to the property of Sarah A. Hibben, is subtracted from the property of Brown and Barnhill and the other owners, and whatever is subtracted from the property of Sarah A. Hibben must be added to the property of Brown and Barnhill and the other property owners.

Adams v. *City of Shelbyville*, 154 Ind., 467.

The greater the assessment upon their own lots, the more they must pay; the greater the assessment upon the town and the other lots, the less they must pay; the smaller the assessments upon the town and the other lots, the more they must pay. And the interest of the other three members of the town board was but little less direct and immediate. If the entire cost is assessed against the abutting property, the town will have naught to pay. Every reduction of the assessment upon abutters means a corresponding increase of the assessment of the town. Every increase of appellant's assessment means a corresponding decrease in the assessment upon the other abutters or the town. The assessment upon the town is paid by a tax levy. As citizens and tax payers, these three must pay a portion. As reasonable, sensible men, they know this. Might or might not this knowledge influence them when they come to make the assessments? Not necessarily to a dishonest intent to escape a just obligation, but to an unconscious bias, the more dangerous because more subtle.

"But Och! Mankind is unco weak;
And little to be trusted;
If self the wavering balance shake,
It's rarely right adjusted."

It makes them judges in their own cause.

This interest would not so much affect the correctness of the assessment if the law required it to be made upon a rigid and arbitrary basis of frontage or area. It would then be a question of mathematical calculation. This was substantially the holding of the Supreme Court of Indiana in the case of *Garvin* v. *Daussman*, 114 Ind., 429, before quoted from. But Indiana adopted a new rule in 1889 and under it the assessment is a judgment after hearing, and the pecuniary interest of the judges makes void the judgment.

In Michigan, the State Constitution required that the benefits and damages of opening an alley should be fixed by a jury, and in *Paul* v. *Detroit*, 32 Mich., 108, at page 117, the court said:

"In immediate connection with this appears a provision which is fatally objectionable. In these proceedings, as explained in *People* v. *Brighton*, and some of the other cases cited, the city of Detroit is a mere party litigant and subject to all the conditions belonging to parties. If there is any one principle relating to juries which cannot safely be disregarded, it is the rule which requires them to be absolutely free from the influence of any party on whose affairs they are to act. The attorney stands in the same disability with the party, and no trial or hearing can be impartial where either party or counsel can exercise any function beyond what is done in open court in all controversies by the parties and their agents. This charter retains the old theory, that this proceeding is a city proceeding, and not a judicial one, and declares that the 'city attorney shall give said jury legal advice and counsel concerning their duties whenever requested.' (Sec. 5.) And that when they have agreed on a verdict, he shall draw it up in the form of a report for their

signature. Sec. 6. This contemplates relations which are illegal and grossly improper, and which can only be explained on the idea that the jury is no jury, and is but a subordinate committee of the council. There may be cases were inquests are provisional, and not conclusive (as in the case of grand juries), where advice of counsel may be allowable to a certain extent. But there is no case of a jury deciding upon rights finally, where such a course has ever been tolerated. It is in violation of the simplest rules of justice, and amounts to *embracery*. Bacon's Ab. 'Jury,' M. 3."

In the case of *Diveny* v. *City of Elmira*, 51 N. Y., 506, the Court of Appeals decided that a resident and a taxpaper of a city was not competent to sit as a juror in a suit against the city for damages for personal injury.

A statute of Michigan sought to give a company certain rights to regulate floating of logs in streams, and to sell logs to pay their charges. Held, in *Ames* v. *Port Huron Log Driving and Booming Co.*, 11 Mich., 139, that the act was unconstitutional, because it took the property of the citizen without giving him a hearing before an impartial tribunal. Because it made the company a judge in its own case.

A Maine statute provided that on appeal from the decision of the county commissioners on petitions for laying, altering, or discontinuing a highway, the Court should appoint a committee of three persons. Held, in the case of *Clifford* v. *York Co. Com.*, 59 Me., 262, that a brother of one of the petitioners was incompetent, and that exceptions should be sustained to their report.

In the case of *State et al.* v. *Crane*, 36 N. J. L., 394, the law provided for the assessment of benefits and damages for opening and improving South Avenue by a board of commissioners, consisting of five persons, freeholders and residents. One commissioner named Hammer, was assessed $50.00 benefits. The complainant was allowed $900.00 damages. The legislature attempted to make such assessments valid by enacting

that if a majority of the commissioners were competent the assessment should be valid. The Supreme Court set aside the assessment saying:

"The fact of his interest is undoubted; what, then, is the effect of it? To make assessments for improvements of this kind requires action of a judicial nature. *State* v. *Newark*, 1 Dutcher, 405. And one of the fundamental maxims of the law is, that no man can be a judge in his own cause. So tenaciously was this adhered to in our State, that the Court of Errors, in *Peck* v. *Freeholders of Essex*, 1 Zab., 656, held that the then Chief Justice of this Court was disqualified from sitting in a cause, by reason of his being an inhabitant, freeholder and tax payer in the County of Essex, and, therefore, interested in a suit to recover money for the county." * * * "The maxim is inherent in and a part of the nature of judicial action, and although in many matters the legislature may provide for the exercise of judicial functions, and designate the persons who shall exercise them, yet it cannot in so doing lose sight of the essential character of judicial action, and authorize or sanction a judgment through instrumentalities contrary to the innate and universally recognized sense of natural justice. In such a case the power conferred would not be judicial; it would be tyrannical."

In the case of *Washington Ins. Co.* v. *Price*, Hopk. Ch. 1, Chanceller Sanford refused to hear the case, because he was a stockholder in the appellant company, holding that he was disqualified by interest. He said:

"Though the principle that a party can never act as judge is not declared by our Constitution or statutes, yet as it is a maxim of universal justice and is undoubted law in England, it exists here as it exists there, a rule of the common law. It is not left to the discretion of a judge, or to his sense of decency, to decide whether he shall act or not; all his powers are subject to this absolute limitation; and when his own rights are in question he has no authority to determine the cause."

In the case of *The Queen* v. *Cheltenham Com.*, 1 A. & E. N. S, 468, a paving act empowered commissioners to lay rates, giving to parties aggrieved an appeal to the quarter sessions, whose order was to be final; on appeal against a rate, the respondents objected to the admission of certain evidence; the sessions, by a majority of eleven magistrates to eight, held the evidence admissible; three of the eleven magistrates were partners in a company to which belonged certain premises assessed to the rate in the name of the occupier. The sessions quashed the rate. Court of Queen's Bench, by all the judges, held the proceeding to be invalid, because of interest.

On a petition to remove an administrator with will annexed because the probate judge who made the appointment was the brother-in-law of the administrator and son-in-law of the principal creditor of the estate, the petition was sustained because the judge was disqualified by interest. The court said in *Hall* v. *Thayer*, 105 Mass., 219:

"The defect is incurable. It does not depend upon the motives with which the judge acted. No wrong motives are imputed to the judge in this case. But it is said by Chief Justice Shaw, in *Gay* v. *Minot*, 3 Cush., 352, 354, that the case being *coram non judice*, the first probate was not voidable merely, but void, incapable of being made good by confirmation, waiver or ratification on the part of those interested. The same is true as to county commissioners. *Tolland* v. *County Commissioners*, 13 Gray, 12."

In proceedings to lay out and open a highway, the president of the board of commissioners was a brother of the wife of the chief petitioner for the highway. Chapman, C. J., in *Taylor* v. *County Com. of Worcester*, 105 Mass., 225, said:

"As one of the county commissioners was a brother-in-law of Bullard, over whose land the highway was located, and who was entitled to damages, the proceeding was *coram*

non judice and utterly void, and no subsequent waiver, consent or release could render it valid. *Hall* v. *Thayer*, *ante*, 219."

The question of what amounts to due process of law and the effect of interest of the judge was fully discussed in an opinion by the United States Court for the Northern District of Ohio, in *Myers* v. *Shields*, 61 Fed., 713, 723, an action to enjoin the collection of certain taxes. The auditor of the county claimed that the complainant's testate had fraudulently withheld certain property from taxation, and the auditor thereupon, according to the statute of Ohio, added the amount so claimed to be omitted, together with penalty, and certified it to the treasurer for collection. The court reviews the authorities at length and holds that the proceedings did not afford the citizen due process of law, *first*, because there was not a judicial hearing, and, *second*, because the statute gave the auditor a per cent. of the amount so collected, and hence his interest disqualified him as judge to determine that the property had been fraudulently withheld. The court quoted and approved other cases as follows:

"In *Pearce* v. *Atwood*, 13 Mass., 324, Chief Justice Parker said: 'It is very certain that by the principles of natural justice and of the common law no man can lawfully sit as a judge in a case in which he may have pecuniary interest. Any interest, however small, has been held to render a judge incompetent.'

"Lord Campbell said, in *Dimes* v. *Grand Junction Canal*, 3 H. L. Cas., 759:

"'It is of the last importance that the maxim that no man is to be a judge in his own case should be held sacred, and that it is not to be confined to a cause in which he is a party, but applies to any cause in which he has an interest. We have again and again set aside proceedings because an individual who had an interest took part in the decision.'

"If one of the judges of a court is disqualified on this ground, the judgment will be void, even though the proper

number may have concurred without the disqualified judge. *Queen* v. *Justices of Hertfordshire*, 6 Q. B., 753; *Railroad Co.* v. *Howard*, 20 Mich., 18. The legislative voice has spoken in equally positive inhibitions against interested persons acting as judges, appraisers, road viewers or commissioners. In Ohio statutory provisions are in force, allowing a change of venue of the suit upon the mere affidavit of the parties of prejudice, bias or interest. * * * *Cooley Const. Lim.*, 410, 411, thus states the rule: 'No one ought to be a judge in his own case. This maxim applies in all cases when judicial functions are to be exercised, and excludes all who are interested, however remotely, from taking part in their exercise. It is not left to the discretion of a judge, or to his sense of decency, to decide whether he shall act or not. All his powers are subject to this absolute limitation, and, when his own rights are in question, he has no authority to determine the case.'

"It is no sufficient answer to these statutory and judicial expositions of the maxims of the law to say that in most of the cases cited the legislature has recognized the disqualification of the judges, appraisers, assessors and commissioners, because of their interest, and provided they should not act when so interested; but in the case of the auditors it has empowered them to act notwithstand their interest, and this policy was necessary to make efficient the revenue laws of the State. But it is not within the power of the legislature to make any process which it may deem necessary or essential, even for the collection of public revenue, 'due process of law,' within the meaning of the Federal Constitution."

To the same effect are the late cases of *Brinkerhoff* v. *Brumfield*, 94 Fed. Rep., 423, and *Aultman & Taylor Co.* v. *Brumfield*, 94 Fed. Rep., 423.

White v. *Connelly*, 105 N. C., 65, decided that a deed was invalid when the grantor, a clerk of the Superior Court, in the exercise of a judicial function, passed upon the sufficiency of the acknowledgment by a justice.

In *Wetzel* v. *State*, 5 Tex. Civ. App., 17, a judgment dissolving a city and enjoining the collection of taxes was de-

cared void and set aside because the judge was a taxpayer of the city. The Court said: "A pecuniary interest in the result of a suit disqualifies a district judge, both at common law and under our Constitution and statute."

Sanborn v. *Fellows*, 22 N. H., 473, was an action to recover defendant's portion of the cost of a partition fence established by fence viewers of the town. One of the viewers was uncle of the plaintiff. Held that the proceedings "were *coram non judice* and void." The Court said:

"The duties of fence viewers we think of a character chiefly judicial. It is not necessary that a magistrate or board should act formally as a court, or that they should be usually so denominated or considered. If they are bound to notify, and hear the parties, and can only decide after weighing and considering such evidence and arguments as the parties choose to lay before them, their action is judicial. * * * The principle is well settled that wherever a tribunal possesses qualified and limited powers, authorizing them to act in certain specified cases only, and by special modes of proceeding, and the law has provided no mode by which these proceedings can be revised, then the proceedings may be impeached collaterally, by showing that the court or magistrates have acted in a case where they had no jurisdiction, or by modes of procedure which they are not authorized to adopt."

To the same effect is the case of *Moses* v. *Julian*, 45 N. H., 52, and *Stearns* v. *Wright*, 51 N. H., 600.

In *Bradley* v. *City of Frankfort*, 99 Ind., 417, the Supreme Court said:

"That all parties whose lands are to be assessed or who are in any way to be affected by the proceedings have the right to demand that the commissioners shall be impartial, is apparent to any one."

The above case was an appeal from a proceeding of the City of Frankfort to open and extend a street. The street commissioner was held to be disqualified because his son-in-

law owned property along the street. It was also held that in-as-much as Section 3167 provided for the appointment of a commissioner *pro tempore* in case the regular commissioner was disqualified, the objection was waived by a property owner having actual notice of the disqualifying interest who failed to object on the hearing before the Common Council.

But in the case at bar the legislature has made no provision for a disqualifying interest. The failure of the legislature to provide against the contingency of the tribunal being disqualified by interest will not give the judge the right to decide when so disqualified.

Washington Ins. Co. v. *Price*, 1 Hopk., Ch., 2;
Ames v. *Port Huron Log-Driving and Booming Co.*, 11 Mich., 139;
Meyers v. *Shields*, 61 Fed., 713–729;
Sanborn v. *Fellows*, 22 N. H., 473.

In *Markley* v. *Rudy*, 115 Ind., 533, the Supreme Court said: "It is a fundamental rule in the administration of justice that no person can be judge in a cause in which he is interested. This rule applies to inferior tribunals as well as to courts of general and appellate jurisdiction. This elementary principle has been so long and so universally recognized that it has become an accepted legal maxim. Broom, Legal Maxims, 116."

The above case was an appeal from an assessment by a surveyor for repairs of a ditch under Section 10 of the Act of 1885 (page 141). Judgment against the surveyor was affirmed, because he owned real estate benefited by the repairs.

In *Pearcy* v. *Michigan Mut. Life Ins. Co.*, 111 Ind., 59, the Court granted a new trial because one of the jurors had taken out a policy on his own life in appellee company, payable to his wife, and failed to disclose this fact on his *voir dire*. The Court cited and approved *Diveny* v. *City of Elmira*

supra, and said: "Unless fair-minded, unbiased jurors can be selected, a trial becomes a mere farce, dependant not upon the merits of the case, but upon extraneous circumstances, such as the bias, prejudice or interest of the jury."

In *Chicago & Atlanta Ry. Co.* v. *Summers*, 113 Ind., 10, appellee brought suit on a judgment rendered in his favor by a justice of the peace who was, at the time, appellee's attorney. Judgment was reversed, the court saying:

"We are of opinion that the facts stated in such answer are amply sufficient to constitute a good defense in bar of appellee's suit or proceeding, and to show, if sustained by the evidence, that the justice's judgment, mentioned in the motion or complaint herein, was and is absolutely null and void. Such a judgment appellant had the right to attack and impeach whenever and however it was sought to be enforced. If, at the time his action against appellant was pending before the first justice, appellee in person had been a qualified and acting justice of the peace of Starke County, and if, when the change of venue was granted, the action had been sent to appellee, as such justice, and he had tried and decided the case, and had rendered and entered judgment therein in his own favor and against appellant, no one could doubt that such judgment was wholly void and could not be enforced; for such a judgment would be in direct violation of the old and well-known legal maxim, namely, *Nemo debet esse Judex in propria sua causa.* Broom Leg. Max., p. 116."

"In legal effect, however, under the averments of appellant's answer herein, the justice's judgment, the payment of which is sought to be enforced in this suit or proceeding, was rendered by the judgment plaintiff, appellee herein, in *propria sua causa.* For it is averred in such answer that the justice of the peace, to whom the action was sent on change of venue, was 'still acting as the attorney for the plaintiff, and not otherwise,' at the time he rendered such judgment in the aforesaid action. If the fact so averred be true, the justice's judgment was unquestionably void."

In the case of *Bass* v. *City of Ft. Wayne*, 121 Ind., 389, an injunction was asked to prevent the City of Fort Wayne from making certain water contracts, alleging that the statute was unconstitutional because it permitted the city council, composed of citizens and taxpayers, to appoint the commissioners to assess the damages. The court said: "We are satisfied that a property owner has a right to have his damages assessed by disinterested persons at some stage of the proceedings prior to a final judgment. *Bradley* v. *City of Frankfort.*" The court held the statute was constitutional because an appeal was allowed. This was in accord with the opinion in *Sanborn* v. *Fellows*, *supra*.

To the same effect is the case of *Board of Com. of Carroll Co.* v. *Justice*, 133 Ind., 89, which was a proceeding to declare void the proceedings of the Board of Commissioners establishing a free gravel road and to enjoin the making of assessments because one of the commissioners owned lands subject to assessment. The commissioners appointed the viewers to make the assesments. The court held that such a decision was voidable and not void, and not open to collateral attack by way of injunction. The court said:

"The maxim that no man should be a judge in his own case is so well established, both in reason and by authority, that it needs neither argument nor the citation of adjudged cases in its support. The effect to be given an adjudication rendered by a disqualified tribunal is another and more troublesome question."

* * * "If no provision had been made in the statute for notice to the land owners affected, at some stage of the proceeding, or opportunity given by appeal, of having their case tried by a duly constituted and impartial tribunal, the remedy by injunction would doubtless be opened to the appellee."

No amount of judicial or logical refinement will convince man that one can justly and honestly hear and weigh evidence in his own case and decide thereon against his own in-

terest. The form of the proceeding is immaterial If the duty to be exercised is of such a judicial character that under the influence of his interest in the subject-matter the judge may so decide as to give to himself an unjust or inequitable advantage and perforce impose upon other parties a corresponding inequity or disadvantage, it is a case where the constitutional guaranty of due process of law is applicable.

North Bloomfield G. M. Co. v. *Keyser*, 58 Cal., 315;
Heilbron v. *Campbell*, 23 Pac. Rep., 122;
Meyer v. *City of San Diego*, 121 Cal., 102;
Inhabitants of North Hampton v. *Smith*, 11 Metc. (Mass.), 390;
Taylor v. *Williams*, 26 Tex., 583;

It has been decided that a taxpayer is disqualified by the common law from acting as judge, juror or commissioner in a case where a part of the assessment for local improvements will come out of the general treasury, but that the legislature may by statute remove this disqualification, or the Court may remove it in case the legislature has provided no other tribunal, to prevent a total failure of jurisdiction. But it is held that when the judge, juror or commissioner is directly interested by reason of being individually liable to pay an assessment, neither the legislature nor the courts can remove the disqualification. That it is fixed by a fundamental constitutional principle.

In *Meyer* v. *City of San Diego*, 121 Cal., 102, it was held that a judge who was a resident and taxpayer of the town was disqualified by interest in an action to declare illegal and void a contract with a water company, involving the expenditure of a large sum of money by the town. The court said that the disqualification of a judge does not spring from the fact that the judge is a citizen, inhabitant and taxpayer of the city, but from the circumstance that he owns property within

the city which may or may not be liable to taxation as he may decide. The authorities agree that in such a case the citizen and taxpayer is disqualified.

Meyer v. *San Diego*, 121 Cal., 102;
City of Oakland v. *Oakland Water Front Co.*, 118 Cal., 249;
State v. *Young*, 31 Fla., 594;
Peck v. *Freeholders of Essex*, 21 N. J. L., 656;
Ex parte Harris, 26 Fla., 77 (23 Am. St. Rep., 548);
City of Guthrie v. *Shaffer*, 7 Okl., 459;
Austin v. *Nalle*, 85 Tex., 520;
Wetzel v. *State*, 5 Tex. Civ. App., 17;
State v. *City of Cisco* (Tex. Civ.), 33 S. W. Rep., 244;
Jefferson Co. etc. v. *Milwaukee Co. etc.*, 20 Wis., 139.

The disqualification is applicable to all officers and boards whose duties are judicial.

Elliott on Munic. Corporations, § 130;
Markley v. *Rudy*, 115 Ind., 533;
Meyer v. *Shields*, 61 Fed. Rep., 713, 723;
Stockwell v. *Township Board of White Lake*, 22 Mich., 341;
Conklin v. *Squire*, 29 Weekly Law Bull., 157.

If the appellee, William C. Smith, had brought suit against the town to determine and collect the cost of paving the street crossings, and all the members of this town board had been on the jury, either plaintiff or defendant could have challenged them for cause, for the reason that they were residents and taxpayers of the town.

Hern v. *City of Greensburg*, 51 Ind., 119;
Board of Com. of Fountain Co. v. *Loeb*, 68 Ind., 29;
Town of Albion v. *Hetrick*, 90 Ind., 545, 549;
City of Goshen v. *England*, 119 Ind., 368;
Gaff v. *State*, 155 Ind., 277.

Jurors are always disqualified because they are not trained to weigh evidence. It is presumed that judges are by training less likely to allow personal considerations to influence their judgments. But the members of this town board were not trained judges, and as to the interest of H. U. Brown and J. C. Barnhill, there is no doubt as to the disqualification. There are no authorities denying the disqualification, and none are needed to support it. Their interest is direct and immediate, and they are absolutely disqualified. Nor is there any question as to the effect of the disqualification. Whether we regard the town board as a jury or as a court sitting *in banc*, the disqualification of the two disqualifies the entire five. To hold otherwise would be to require the plaintiff in error to show what influence these two had upon the final decision. This is manifestly impossible, and to attempt it would require an impracticable inquiry into the method of arriving at the judgment.

Broom Leg. Max., 120;
Freeman on Judg'ts, § 147 (4th Ed.);
14 Vin. Abr., 573, pl. 28;
Oakley v. *Aspinwall*, 3 N. Y., 547;
Hasketh v. *Braddock*, 3 Burr., 1847;
Queen v. *Justices*, 6 Q. B., 753;
Reg. v. *Justices of Surrey*, 21 L. J. M. C., 195;
Esdaile v. *Lund*, 12 M. & W., 734;
Queen v. *Justices of Suffolk*, 18 Q. B., 416;
Reg. v. *Upton St Leonard's*, 10 Q. B., 827 (59 E. C. L. R.);
State v. *Crane*, 36 N. J. L., 394;
Foster v. *Cape May*, 60 N. J. L., 78, 82;
Traction Co. v. *Board of Works*, 56 N. J. L., 431;
Baldwin v. *McArthur*, 17 Barb., 414, 421.
Converse v. *McArthur*, 17 Barb., 410, 411.

Meyers v. *Shields*, 61 Fed., 713.
Dimes v. *Grand Junction Canal*, 3. H. L. Cas., 759, 793;
Peninsula R. R. Co. v. *Howard*, 20 Mich., 18.

It is sometimes suggested that necessity may make it necessary for the legislature to make a man judge in his own case. It has been so held by a few courts. But this is not the necessity of a single case, but is the general and universal necessity that makes the judges "as fair and impartial as the lot of humanity doth permit." For example, if the interest of a taxpayer and resident of a State would disqualify in all suits by or against the State, it would amount to a destruction of jurisdiction in all cases in which the State was a party.

Meyer v. *City of San Diego*, 121 Cal., 102;
Board of Com. of Fountain Co. v. *Loeb*, 68 Ind., 29;
State v. *Crane*, 36 N. J. L., 394, 400;
Moses v. *Julian*, 45 N. H. 52; 84 Am. Dec., 114;
Washington Ins. Co. v. *Price*, Hopk. Ch., 1;
Anonymous, 1 Salk., 396.

Nor is the legislature the final judge of this necessity. It may be suggested that notwithstanding the constitutional guaranty, the legislature may say that in certain specific cases interest does not disqualify. As was said above, it has been decided in a few cases that the disqualification of a resident and taxpayer as a judge may be removed by the legislature. But to say that the legislature is the final judge in all cases of what interest will disqualify, is to utterly repudiate all our constitutions, both written and unwritten, and to leave the citizen at the mercy of every legislative whim and caprice. Such a legislative act is unconstitutional.

Cooley's Const. Lim. (6th Ed.), 506, *et. seq.*;
Conklin v. *Squire*, 29 Weekly Law Bull., 157;
Day v. *Savadge*, Hob., 85;
Hasketh v. *Braddock*, 3 Burr., 1847;

Bonham Case, 8 Coke, 212, 219, 224;
Great Charte v. *Kensington*, 2 Stra., 1173;
State v. *Castleberry*, 23 Ala., 85;
Peck v. *Essex*, 21 N. J. L., 656;
State v. *Crane*, 36 N. J. L., 394;
Chamber v. *Hodges*, 23 Tex., 104.

In these improvement cases we hear a great deal about collateral attack, about void and voidable judgments and about waiving the objections. But all this has nothing to do with this case.

Plaintiff in error has not waived the right to object to the interest of Brown and Barnhill and of all the members of the board for the reason that she never had an opportunity to object. The Barrett Law makes no provision for objecting to the qualifications or competency of the board or of any member for any reason. In *Bradley* v. *City of Frankfort*, 99 Ind., 417, it was held that the right to object to a commissioner was waived by failure to object at a time when another might by law have been appointed in his stead. This is just and right. To say that appellant has waived the right to object to the interest of the member of the board is unjust and wrong—is nonsense. When could she object, and how, and what relief could be given her?

"A party, however, does not waive an objection which he has no opportunity of making."

Shoemaker v. *Smith*, 74 Ind., 71, 75.

It is urged by the defendants in error that this is a collateral attack; that a void judgment may be attacked collaterally; that a voidable judgment cannot be attacked collaterally; that a judgment by an interested tribunal is voidable, not void, and that therefore plaintiff in error cannot attack this judgment collaterally; that her remedy is by direct attack. Her answer is that by the statute nobody except this town

board had any right to make this assessment; that after they decided it wrongly she had no right to appeal from the decision and no right to have the decision reviewed (*Klein* v. *Tuhey*, 13 Ind. App., 74; *Chicago & E. R. Co.* v. *City of Huntington*, 149 Ind., 518); that she had no right to take a change of venue and that the members of the Court had such an interest that it was unreasonable to expect a just and impartial decision, and whether the judgment be void or voidable, whether it be subject to collateral or direct attack, whether this be a collateral or direct attack, is all indifferent to her. It is now or never with plaintiff in error. If this court says that she cannot now in this action object to the assessment made against her lots by Hilton U. Brown and J. C. Barnhill, it is saying that what the constitution forbids to it, the legislature may do; that an act of the legislature forbidden by the constitution is obligatory upon the citizen; that a void act of the legislature is of more commanding force than a guaranty of the constitution; that the Supreme Court of the State is powerless to protect the citizen against the acts of the town board of Irvington, and that the judicial power is helpless before the town board.

But this assessment may be attacked collaterally. In the opinion in this case it is said that "the doctrine seems to be well settled that in order to render a judgment of a Court or other tribunal invested with the power to decide in a matter void, so as to open such judgement to a collateral attack, an absence must be shown of either: First, a legal organization of the tribunal; or, Second, jurisdiction, etc." This first essential was absent in the town board. It was not only not a legal organization, but it was not a constitutional organization. It it were not the last, it could not be the first.

The cases holding that a judgment by an interested tribunal are voidable and not void specifically exempt the judgments of those inferior tribunals from which no appeal or writ of error lies.

Sanborn v. *Fellows*, 22 N. H., 473;
Moses v. *Julian*, 45 N. H., 52;
Stearns v. *Wright*, 51 N. H., 600;
Board of Com. of Carroll Co. v. *Justice*, 133 Ind., 89;
Bass v. *City of Ft. Wayne*, 121 Ind., 389;
Chicago & Atlanta Ry. Co. v. *Summers*, 113 Ind., 10;
Gay v. *Minot*, 3 Cush., 353;
Hall v. *Thayer*, 105 Mass., 219;
Taylor v. *County Com. of Worcester*, 105 Mass., 225;
State v. *Crane*, 36 N. J. L., 394;
Meyers v. *Shields*, 61 Fed. Rep., 713, 723;
Wetzel v. *State*, 5 Tex. Civ. App., 17;
Sanborn v. *Fellows*, 22 N. H., 473;
Donnelly v. *Howard*, 60 Cal., 291;
Galbreath v. *Newton*, 30 Mo. App., 380.

The only reason given for denying the right to collaterally attack the judgment of interested tribunals is that the complaining party should either take a change of venue to an impartial tribunal or attack the judgment directly by appeal or writ of error.

Bradley v. *City of Frankfort*, 99 Ind., 417;
Bass v. *City of Ft. Wayne*, 121 Ind., 389;
Board of Com. of Carroll Co. v. *Justice*, 133 Ind., 89.

If the failure to take advantage of these rights when granted suffice to take away the right to attack collaterally, the failure to grant these rights should in some wise inure to the benefit of plaintiff in error.

"The principle is well settled that whenever a tribunal possesses qualified and limited powers, authorizing them to act in certain specified cases only, and by special modes of proceeding, and the law has provided no mode by which these proceedings can be revised, then the proceedings may be im-

peached collaterally, by showing that the Court or magistrates have acted in a case where they had no jurisdiction, or by modes of procedure which they are not authorized to adopt."

Sanborn v. *Fellows*, 22 N. H., 473.

The contractor should be paid for making the improvement and plaintiff in error should pay her part. She has no hope or desire to escape the payment of her just portion. But it is just as bad for plaintiff in error to be compelled to pay $1,000 in excess of the benefits as for the contractor to lose $1,000 of the contract price. A statute or an ordinance that does the one is just as repugnant to constitutional right and justice as a statute or ordinance that does the other. Contractor Smith should be paid the entire contract price of the improvement. Plaintiff in error should pay her portion, no more. But she should not be compelled to pay an assessment in substantial excess of the benefits. The authorities following the front foot rule concede that much.

Hadley v. *Dague*, 130 Cal., 207;
Schroder v. *Overman*, 61 Ohio St., 1;
Cleveland v. *Tripp*, 13 R. I., 50;
Lent v. *Tillson*, 72 Cal., 404, 428;
Ramish v. *Hartwell*, 126 Cal., 443.

In *Wight* v. *Davidson*, 181 U. S., 371, the Supreme Court of the United States used this language: "Special facts, showing an abuse or disregard of the law, resulting in actual deprivation of property, may give grounds for applying for relief to a court of equity."

We submit that such "special facts" appear in this case.

Plaintiff in error prays relief at the hands of this Court for the following reasons:

First. The statute is unconstitutional because it does not provide a constitutional tribunal.

Second. The tribunal was unconstitutional because of the interest of the members.

Third. The assessment was unconstitutional,

(*a*) Because of such interest and

(*b*) Because made arbitrarily.

Fourth. Due process of law, as guaranteed by the Federal constitution, is the antithesis of arbitrary action.

Fifth. Due process of law, as guaranteed by the Federal constitution, forbids that any man should be judge in his own cause.

We submit that the judgment of the Supreme Court of Indiana should be reversed.

MURAT W. HOPKINS,
RUSSELL T. MACFALL.
MERRILL MOORES.

Solicitors and of Counsel for Plaintiff in Error.

INDIANAPOLIS, IND., Oct. 1, 1903.

TABLE OF CASES.

PAGES.

Adams *v.* City of Shelbyville, 154 Ind., 467.....15, 21, 24, 56, 57
Ames *v.* Port Huron Log Driving and Booming Co , 11 Mich., 139..21, 59, 65
Anderson *v.* Baker, 98 Ind., 587 .....15, 32
Anonymous, 1 Salk., 396 .....19, 71
Appeal of Nettleton, 28 Conn., 268 20
Aultman & Taylor Co. *v.* Brumfield, 94 Fed., 423..... 22, 63
Austin *v.* Nalle, 85 Tex., 520 ....22, 69
Bagge Case, 11 Rep., 93b, 99a 17, 35
Baldwin *v.* McArthur, 17 Barb., 414, 421..... 70
Bank of Columbia *v.* Okely, 4 Wheat., 235, 244.....18, 36
Barber, etc. Co. *v* Edgerton, 125 Ind , 455..... .....16, 31
Barnett *v.* Ashmore, 5 Wash. St., 163..... 22
Bass *v.* City of Fort Wayne, 121 Ind., 389..... .....21, 67, 74
Block *v.* State, 100 Ind., 357..... 20
Board *v.* Heaston, 144 Ind., 583..... 21
Board of Com. of Carroll Co. *v.* Justice, 133 Ind., 89.....21, 67, 74
Board of Com. of Fountain Co. *v* Loeb, 68 Ind., 29 .....20, 69, 71
Bonham Case, 8 Coke, 212, 219, 224.....19, 72
Bonaker *v.* Evans, 16 Q. B , 162 .....17, 35, 38
Boswell's Case, 6 Rep., 52a.....17, 35
Bradley *v.* City of Frankfort, 99 Ind., 417.....20, 64, 67, 72, 74
Brinkerhoff *v* Brumfield, 94 Fed., 423..... 63
Brown *v.* City of Denver, 7 Col., 305, S C , 3 Am. and Eng. Corp. Cas , 630... 15
Buckingham *v.* Davis, 9 Md., 324 21
Calder *v.* Bull, 3 Dallas, 386, 388.....18, 22, 38, 55
Campbell *v.* Dwiggins, 83 Ind., 473 .....15, 17, 36, 56
Campbell *v.* Board of Com., 118 Ind., 119.....16, 31
Capel *v.* Childs, 2 Cromp. & Jer , 558, 574 .....17, 35, 38
Case *v.* Hoffman, 100 Wis., 314, 351..... 22
Chambers *v.* Hodges, 23 Tex., 104..... .....22, 72
Chicago & Atlanta Ry. Co. *v.* Summers, 113 Ind., 10.....21, 66, 74
Chicago & E R. Co. *v.* City of Huntington, 159 Ind , 518..... 21, 56, 73
City of Ft. Wayne *v* Cody, 43 Ind., 197..... .....15, 30, 32
City of Goshen *v.* England, 119 Ind , 368.....21, 69
City of Guthrie *v.* Shaffer, 7 Okla., 459..... .....22, 69
City of Indianapolis *v.* Holt, 155 Ind., 222, 240.....15, 25
City of New Albany *v.* Cook, 29 Ind., 220.....15, 23

PAGES.

City of Oakland *v.* Oakland Water Front Co., 118 Cal., 249.....20, 69
City of Phila. *v.* Miller, 49 Pa. St., 440..... 16
Cleveland *v.* Tripp, 13 R. I., 50.....22, 75
Clifford *v.* York Co. Com., 59 Me., 262.....21, 59
Conklin *v.* Squire, 29 Weekly Law Bull., 157.....22, 69
Converse *v.* McArthur, 17 Barb., 410, 411.....22, 70
Cooper *v.* Board of Works, 108 E. C. L. R., 181.....17, 44
Davidson *v.* New Orleans, 96 U. S., 97, 104.....18, 36, 44, 45
Day *v.* Savadge, Hob., 85..... 19
DeFrees *v.* Ferstl, 154 Ind., 695, 696.....15, 25
Dewey *v.* DesMoines, 173 U. S., 193.....16, 31
Dimes *v.* Grand Junction Canal, 3 H. L. Cas., 759, 793 .....20, 54, 62, 71
Diveny *v.* City of Elmira, 51 N. Y., 506.....22, 59, 65
Donnelly *v.* Howard, 60 Cal., 291.....20, 74
Earl of Derby's Case, 12 Coke, 114.....19, 52, 53
Edwards *v.* Russell, 21 Wend., 64..... 22
Esdaile *v.* Lund, 12 M. & W., 734.....19, 70
Ex Parte Harris, 26 Fla , 77; S. C , 23, Am. St. Rep., 548.. .....20, 69
Ex Parte Logan Branch Bank, 1 Ohio St., 432.....18, 48
Fechheimer *v.* Washington, 77 Ind., 366..... 20
Findley *v.* Smith, 42 W. Va., 299..... 22
Flournoy *v.* City of Jeffersonville, 17 Ind., 169.....15, 30
Foster *v.* Cape May, 60 N. J. L., 78, 82.....22, 70
French *v* Barber Asphalt Paving Co., 181 U. S , 324.....18, 40
Freeland *v* Hastings, 10 Allen, 570, 575.....18, 42
Gaff *v.* State, 155 Ind., 277.....21, 69
Gay *v.* Minot , 3 Cush., 352, 354.. .....21, 61, 74
Galbreath *v.* Newton, 30 Mo. App , 380.....21, 74
Galpin *v.* Page, 18 Wall.. 350, 368..... .....18, 37
Garvin *v.* Daussman, 114 Ind , 429.. .....16, 27, 32, 58
Gorman *v* State, 157 Ind., 205..... 25
Graham *v.* Furber, 14 C. B., 165 (78 E. C. L. R.).....17, 35
Great Charte *v.* Kensington, 2 Str , 1173.....19, 72
Gregory *v.* Cleveland R. R. Co., 4 O. St , 675.....22
Guckien *v.* Rothrock, 137 Ind., 355.....16, 31
Hadley *v* Dague, 130 Cal., 207.....20, 75
Hagan *v.* Reclamation District No. 108, 111 U. S., 701, 710..16, 18, 32, 36, 44
Hall *v.* Thayer, 105 Mass., 219.....21, 61, 62, 74
Harman *v.* Moore, 112 Ind., 227..... .....16, 32
Harmon *v.* State, 66 Ohio St., 249..... .....18, 36
Harper *v.* Carr, 7 T. R., 266, 270.....17, 35

PAGES.

Hasketh v. Braddock, 3 Burr., 1847.....19, 70
Hawley v. Baldwin, 19 Conn., 585.....20
Heick v. Voight, 110 Ind., 279, 285.....17
Heilbron v. Campbell, 23 Pac. Rep., 122 (Cal.).....20, 68
Hern v. City of Greensburg, 51 Ind., 119.....20, 69
Heydenfeldt v Towns, 27 Ala., 423.....20
Hovey v. Elliott, 167 U. S., 409.....18, 37
Hurtado v. California, 110 U. S., 516, 536.....18, 45
Hudson v. Wood, 52 N. E., 612 (Ind. App).....20
Hughes v. Parker, 148 Ind., 692.....14
Inhabitants of North Hampton v Smith, 11 Metc (Mass.), 390.....21, 68
In re Brook, 16 C. B. N. S., 416 (111 E. C. L. R.).....17, 35
In re Hammersmith Rent Charge, 4 Exch., 97.....17, 35
Jefferson Co. v. Milwaukee Co., 20 Wis., 139.....22, 69
Jenk. 40, Case 76; 90, Case 74.....19, 53
Jones Co. v. Perry, 26 Ind. App., 554.....17, 47
Kirsch v Braun, 153 Ind., 247.....16, 32
Klein v. Nugent Gravel Co. (Ind. App.), 66 N. E., 486.....15, 17, 25, 47
Klein v Tuhey, 13 Ind. App., 74.....20, 56, 73
Kuntz v Sumption, 117 Ind., 1.....16, 18, 31, 48
Langenberg v. Decker, 131 Ind., 471.....18, 48
Leeds v DeFrees, 157 Ind., 392.....15, 25, 26, 32
Lent v Tillson, 72 Cal., 404, 428.....20, 75
Lipes v. Hand, 104 Ind., 503, 507.....17
Marion Bond Co. v. Johnson, 29 Ind. App., 294.....15, 25
Markley v. Rudy, 115 Ind., 533.....21, 65, 69
McCullough v. State of Maryland, 4 Wheat., 316, 427.....18, 42
McKee v. Town of Pendleton, 154 Ind., 652.....15, 25
McVeigh v. United States, 11 Wall., 259.....18, 38
Meyer v. City of San Diego, 121 Cal., 102.....20, 68, 69, 71
Meyers v. Shields, 61 Fed., 713, 723.....16, 22, 30, 62, 65, 69, 71, 74
Moses v. Julian, 45 N. H., 52.....21, 64, 71, 74
Motz v City of Detroit, 18 Mich., 495.....16, 32
Murray's Lessee v. Hoboken Land and Improvement Co., 18 How., 272, 284.....16, 18, 32, 40
North Bloomfield Gravel Min. Co. v. Keyser, 58 Cal., 315.....20, 68
Oakley v. Aspinwall, 3 N. Y., 547.....22, 70
Ochus v. Sheldon, 12 Fla., 138.....20
Overing v Foote, 65 N. Y., 263.....16
Paul v. Detroit, 32 Mich., 108, 118.....18, 21, 40, 58
Pearce v. Atwood, 13 Mass., 324.....21, 62

PAGES.

Pearcy *v.* Mich. Mutual Life Ins. Co., 111 Ind., 59.....21, 65
Pearson *v.* Yewdall, 95 U. S., 294.....18, 47
Peck *v.* Freeholders of Essex, 21 N. J. L., 656.....21, 60, 69, 72
Peninsula R. R. Co. *v.* Howard, 20 Mich., 18, 25.....21, 63, 71
Fennoyer *v.* Neff, 95 U. S., 714, 733.....22, 54
People *v* Chase, 165 Ill., 527.....18, 48
Prohibition *del* Roy, 12 Rep., 63.....17, 35
Queen *v.* Com. for Cheltenham, 1 A and E. N. S., 468.....19, 61
Queen *v.* Justices of Hertfordshire, 6 Q B, 753.....19, 63, 70
Queen *v.* Justices of Suffolk, 18 Q B., 416.....20, 70
Railroad Tax Cases, 13 Fed., 722, 734, 751, 755.....18, 36, 42
Ramish *v.* Hartwell, 126 Cal, 443.....20, 75
Ranger *v.* Great Western Ry. Co., 5 H. L. Cas., 72, 88, 89.....20
Reg. *v.* Aberdare Canal Co, 14 Q. B., 853 (68 E. C. L. R).....20
Reg. *v.* Archbishop of Canterbury, 1 E. & E., 559 (102 E. C. L. R.).....17, 35
Regina *v.* Justices, 14 Eng. L. and Eq., 93.....20
Reg. *v.* Justices of Surrey, 21 L. J. M. C., 195.....19, 70
Reg. *v.* Saddler's Co., 10 H. L. Cas, 404.....17, 35
Reg. *v.* Upton St. Leonard's, 10 Q. B., 827 (59 E. C. L. R.).....19, 70
Rex. *v.* Beun, 6 T. R., 198.....17, 35
Rex. *v.* Chancellor of Cambridge (Dr Bentley's Case), 1 Strange, 557..17, 35, 44
Rex. *v.* Geskin, 8 T. R., 209.....17, 35
Russell *v.* Perry, 14 N. H., 152.....21
Sanborn *v.* Fellows, 22 N. H., 473.....18, 21, 48, 64, 65, 67, 74, 75
Santa Clara *v.* Southern Pacific R. R. Co., 13 Am. & Eng. R. R. Cas., 182... 16
Schaefer *v.* Werling, 156 Ind., 704.....15, 25
School Twpt. *v* Irwin, 150 Ind., 12.....16, 32
Schroder *v.* Ehlers, 31 N. J. L., 44.....22
Schroder *v.* Overman, 61 Ohio St., 1.....22, 75
Shank *v.* Smith, 157 Ind., 401.....15, 25
Shoemaker *v* Smith, 74 Ind., 71, 75.....20, 72
State *v.* Castleberry, 23 Ala., 85.....20, 72
State *v.* City of Cisco (Tex Civ.), 33 S. W., 244.....22, 69
State *et al. v.* Crane, 36 N. J. L., 394.....22, 59, 70, 71, 72, 74
State *v* Guilbert, 56 Ohio St., 575.....18, 48
State *v.* Newark, 1 Dutcher, 405.....21, 60
State *v* Noble, 118 Ind., 350, 366, 370.....18, 48
State Tax on Foreign Held Bonds, 15 Wall, 300, 319.....18, 36
State *v* Young, 31 Fla., 594.....20, 69
Stearns *v.* Wright, 51 N. H., 600, 610.....21, 64, 74
Stockwell *v.* Township Board of White Lake, 22 Mich, 341.....21, 69

PAGES.

Stuart *v.* Palmer, 74 N. Y., 183.....16, 18, 28, 32, 42
Sunier *v.* Miller, 105 Ind., 393.....16, 32
Taylor *v.* City of Crawfordsville, 155 Ind., 403, 405.....15, 25
Taylor *v.* County Com of Worcester, 105 Mass., 225.....21, 61, 74
Taylor *v.* Williams, 26 Tex , 583.....22, 68
Templeton *v.* Giddings, 12 S. W. Rep., 851 (Tex.)..... 22
Thomas *v.* Gain, 35 Mich., 155..... 16
Thompson *v.* Goldthwait, 132 Ind., 20.....16, 31
Tolland *v.* County Com., 13 Gray, 12.....21, 61
Town of Albion *v.* Hetrick, 90 Ind., 545, 549.....20, 69
Town of Greenwood *v.* Lawson (Ind.), 64 N. E , 849, 850.....16, 32
Traction Co. *v.* Board of Works, 56 N, J. L., 431..... .....21, 70
Van Ness *v.* Packard, 2 Pet., 137, 144.....18, 41
Washington Ins. Co. *v.* Price, 1 Hopk., Ch. 1.....22, 60, 65, 71
Wetzel *v.* State, 5 Tex. Civ. App., 17.....22, 63, 69, 74
Whitcomb Case, 120 Mass., 118.....18, 48
Whiteford Tp. *v.* Probate Judge, 53 Mich., 130..... 16
White *v.* Connelly, 105 N. C., 65.....22, 63
Wight *v.* Davidson, 181 U. S., 371.....22, 75
Wilkins *v.* State, 113 Ind., 514.....18, 48
Windsor *v.* McVeigh, 93 U. S., 274..... .....18, 38
Wray *v.* Fry, 158 Ind., 92.....15, 25
Zeigler *v.* S. & N. Ala. R. R. Co., 58 Ala., 594.....17, 39
Zimmerman *v.* State, 115 Ind., 129..... 21

TEXT BOOKS AND DOCUMENTS.

PAGES.

Bacon's Abr., "Jury" M., 3.....19, 59
Bill of Rights, 1 W. & M., Sess. 2, c. 2.....16, 42
4 Black. Com., 424.....17, 36, 42
Black on Judgts., §§ 290, 291.....15, 32
Bouvier Law Dict., tit. Judge.....19
1 Brook's Abr., 177, tit. conusans, 27.....19
Broom. Max. (8th Am. Ed.), 116, 120.....17, 19, 35, 52, 53, 65, 66, 70
Burns' Justice, III, 132.....19
Cod , 3, 5, 1.....19, 53
2 Coke Inst., p. 46.....17, 42
Coke, Litt., 141 a, § 212.....19, 52
Com. Dig., 101, 4 Justices, I, 3.....19
Cooley Const. Lim. (6th Ed.), 35, 104, 108, 429,
506, 599.....15, 17, 19, 26, 35, 42, 48, 53, 63
Cooley on Taxation (2d Ed.), 674.....15, 47
Domat Public Law, lib. 2, tit. 1, sec. 2, 14.....19
Elliott on Mun. Corp., § 130.....15, 19, 30, 69
Elliott, Roads and Streets (2d Ed.), §§ 281, 564.....15
Freeman on Judgts. (4th Ed.), §§ 144, 145, 147.....19, 70
Inst., 4 Vol., 71.....19
Journal Confederative Congress, Vol. XII, p. 58.....17, 42
Journal of Congress, Vol. I, p. 28, Ed. Phil., 1800.....17, 42
Just. Code, lib. 1, tit. 1, 16.....19
2 Kent. Com. (11th Ed.), 2, note 3, 6.....17, 36, 42
Littleton, § 212.....19, 52
Magna Charta.....16, 36, 42
Ordinance of 1787, Art. 4.....17, 42
Pandects, pars. II, lib. 5, 17.....19, 53
Petition of Rights, 1 Car. 1, c. 1.....16, 42
Pothier's Pro. Civ. C. 2, sec. 5.....19
Rev. Statutes, Indiana (1894).....49
Rolle, Abr. Judges, Pl., 11.....19
Stamp Act.....17, 42
Story on Const., vol. 2, § 1789.....17, 35
Van Fleet, Coll. Att., § 16.....15, 32
14 Vin. Abr. 573, pl. 28.....19, 70
Voet. Ad. Pand., lib. 5, tit. 1, 43.....19

APPENDIX.

Barrett Law. (Acts 1889, p. 237), Indiana Revised Statutes 1894.

4288. Petitions for Street Improvements—Procedure. 1.

4289. Resolution of necessity—Notice to objectors. 2.

4290. Apportionment of costs—liens—Sale. 3. In all contracts specified in the preceding section the cost of any street or alley improvement shall be estimated according to the whole length of the street or alley, or the part thereof to be improved per running foot, and the cost of any such sewer shall be apportioned among the lands, lots and parts of lots, benefited thereby, and according to such benefits without regard to the assessment for taxation of such property, and the city or incorporated town shall be liable to the contractor for the contract price of said improvement, and the owners of lots or parts of lots bordering on such street or alley, or the part thereof to be improved, or of the lots or parts of lots benefited by the construction of such sewer, shall be liable to the city for their proportion of the costs in the ratio of the front line of their lots owned by them to the whole improved line for street and alley improvements, and for the construction of such sewer for the benefit of such lots or parts of lots thereby, and the city or incorporated town shall have a lien upon such lots or parts of lots, respectively, from the time such improvement is ordered, for such costs of improvement, collectible as hereinafter provided, and in all cases where such improvement shall have been made, or may hereafter be made on any street or alley running along or through any unplatted lands lying within the corporate limits of such city or incorporated town, the cost of such improvement shall be estimated according to the whole length of the street or alley, or the part thereof to be improved per running foot, and the owners of such unplatted lands bordering on such street or alley or the part thereof to be improved shall be liable to the contractor for their proportion of their cost, in the ratio of the front lines of such unplatted lands owned by them to the whole improved line; and in making the assessment against such owners for the improvement of such lots or parts of lots and unplatted lands shall be assessed upon

the ground fronting or immediately abutting on such improvement back to the distance of one hundred and fifty feet from such front line, and the city or incorporated town and the contractor shall have a lien thereon for the value of such improvement: Provided, however, That where such land is subdivided or platted the land lying immediately upon and adjacent to the line of the improvement and extending back fifty feet shall be primarily liable to and for the whole cost of the improvement, and, should that prove insufficient to pay such cost, then the second parcel and other parcels in their order to the rear parcel of said one hundred and fifty feet shall be liable in their order. Such assessments, with the interest accruing thereon, shall be a lien upon the property so assessed and shall remain a lien until fully paid, and shall have precedence over all other liens, excepting taxes, and shall not be divested by any judicial sale, and if such city or incorporated town shall fail, neglect or refuse to promptly enforce and collect such assessment when due, the owner or holder of any of the bonds or certificates hereinafter mentioned may foreclose such lien or liens as a mortgage is foreclosed in any court of competent jurisdiction, and shall recover in addition to the amount of said bonds and interest and all costs, a reasonable attorney's fee. The amount realized by the sale of any such property, or the payment of such assessment after the payment of the costs of such proceeding shall, to the extent of such assessment, with interest thereon, be applied *pro rata* to the payment of the then outstanding bonds or certificates herein mentioned without reference to the time of the maturity of the bonds or certificates. Any mistake in the description of the property or in the name of the owner shall not vitiate the lien of such assessment. Such city or town shall be liable and pay for all that part of such street or alley improvement as shall be occupied by the street and alley crossings, and may order that any part of the total cost of any of the improvement in this act mentioned shall be paid out of the general fund.

4291. Allowance to owner who has improved—Bonds. 4.

4292. Estimates--How paid—Liens. 5. When any such contract shall be made, or shall have been heretofore made, and shall have been in progress of fulfillment, the common council of such city or the board of trustees of such town

shall have power to cause estimates to be made from time to time of the amount of work done by the contractor, and to cause the same to be paid out of the treasury, deducting a reasonable amount of percentage to secure the completion of the contract, until the whole shall be finished, and to prescribe the time in which the whole shall be completed, and such estimates shall be a lien upon the several parcels of ground upon which they are assessed to the same extent that taxes are a lien, and shall have the same preferences over other demands, and such liens shall be in favor of the city or incorporated town and the owner of the certificate or bonds hereinafter mentioned to secure to the city or incorporated town and such owners the reimbursement for such cost of improvements hereinafter provided for. The common council of such city or the board of trustees of such town, with the concurrence of two-thirds of the members thereof, may order or cause any or all the improvements mentioned in the first section of this act, and repairs of any kinds of streets and alleys to be made in like manner, without such petition, and either charge or cause any or all of the expenses thereof to be assessed and collected, as hereinafter provided, when petition is made, or if it is deemed just and right by the common council of such city or the board of trustees of such town to cause such expenses, or any part thereof, to be paid out of the general revenue of the city or incorporated town.

4293. Final estimate of costs—Report of engineer. 6. When any such improvement has been made and completed according to the terms of the contract therefor made, the common council of such city or the board of trustees of such town shall cause a final estimate of the total cost thereof to be made by the city or town engineer, and the common council of such city or the board of trustees of such town shall require said city or town engineer to report to the common council of such city or the board of trustees of such town the following facts touching said improvement: First. The total cost of said improvement. Second. The average cost per running foot of the whole length of that part of the street or alley so improved. Third. The name of each property owner on that part of the street or alley so improved. Fourth. The number of front feet owned by the respective property owners on that part of said street so improved. Fifth. The

amount of such cost for improvement due upon each lot or parcel of ground bordering on said street or alley, which amount shall be ascertained and fixed by multiplying the average cost price per running front foot by the number of running front feet of the several lots or parcels of ground respectively. Sixth. The full description, together with the owner's name, of each lot or parcel of ground bordering on said street so improved. Seventh. In the case of the construction of a sewer, a description of each lot or parcel of lot benefited thereby, together with the owner's name and the fair proportion of the cost of such sewer according to the benefits conferred thereby, that should be assessed against such lot or part of a lot.

4294. Notice of hearing—Assessments—Liens. 7. Upon the filing of the report provided for in the last preceding section, the common council of such city or the board of trustees of such town shall give two weeks' notice in a newspaper printed and published in such city or incorporated town, if any there be, and if there be no such paper, then a newspaper printed and published in the county in which such city or incorporated town is located, of the time and place, when and where, a hearing can be had upon such report, before a committee to be appointed to consider such reports, and such committee shall make report to the common council of such city or the board of trustees of such town, recommending the adoption or alteration of such report, and the common council of such city or the board of trustees of such town may adopt, alter or amend such report and the assessments therein. Any person feeling aggrieved by such report shall have the right to appear before such committees and the common council of such city or the board of trustees of such town, and make objection thereto, and shall be accorded a hearing thereon, and the common council of such city, or the board of trustees of such town, shall assess against the several lots or parcels of ground the several amounts which shall be assessed for and on account of such improvement, which said amounts shall bear interest at the rate of six per cent per annum from the time of the finding of the completion of said improvement by the common council or board of trustees, as mentioned in section 6 of this act. Should any one of such assessments exceed the sum of fifty dollars, then if the owner of the lot or parcel against

which said assessment is made, may, if he, within two weeks after the making of such assessments, shall promise and agree, in writing, to be filed with the clerk of such city or town, and to be spread of record by him in consideration of the right to pay his or their assessment, or respective assessments in installments, that they will not make any objections to illegality or irregularity as to their respective assessments, and will pay the same, with interest thereon, at the rate of not exceeding six per centum per annum, as shall by ordinance or resolution of the common council of such city, or board of trustees of such town, be prescribed and required, he or they shall have the benefit of paying said assessments in ten annual installments, as hereinafter provided. Any owner of any lot who has been assessed more than the sum of fifty dollars thereon for the cost of such improvement who will not promise and agree in writing as herein provided, and all other owners of lots or parcels wherein assessments less than fifty dollars have been made or have heretofore been made against any one lot or parcel, shall be required to pay his or their assessment in full when made, and the same may be collected according to the provisions of amended section 10 of this act, or the contractor or his assigns may foreclose such assessment as a mortgage is foreclosed in any court of competent jurisdiction, and shall recover in addition to the amount of such assessment, with interest, all costs and a reasonable attorney's fee. Whenever any payment shall be made upon any of such assessments, it shall be the duty of the treasurer, contractor or owner of the assessments, bonds or certificates or installments of assessments, as hereinafter provided, receiving such payment, to enter upon the proper record the receipt of such money, and such receipt shall be a discharge of the lien of such assessment to the extent of such payment, and upon the payment of any bonds or certificates as are issued under this act they shall be surrendered to and cancelled by the treasurer; when bonds have been requested as aforesaid, then the common council of such city or the board of trustees of such town shall cause the said assessment amounting to more than fifty dollars and bonds requested therefor to be placed upon the city or incorporated town tax duplicate and charged against the several lots or parcels of ground, as follows: Ten per cent for each successive year

for ten years, to which several amounts shall be added and placed on the duplicate, interest at six per cent per annum, payable semi-annually, which shall be calculated from the time of the acceptance of the work by the common council or board of trustees, until the several allowances fall due; and the first ten per cent shall be due and payable when the first tax falls due and is payable after such assessment is made; and said assessment, as made, together with the interest thereon, shall be a lien upon the several lots or parcels of ground to the same extent that taxes are a lien upon such property, and shall be collectible in the same way that taxes are collectible, or in such manner as the common council or board of trustees by ordinance, shall prescribe; and the law governing the collection of taxes shall, so far as the same is applicable, regulate and govern the collection of such assessment, and such assessment, and the proceeds arising therefrom, shall constitute a special fund for the payment of the costs of such street, alley or sewer improvement and the bonds and certificates hereinafter mentioned and for no other purpose. (As amended, Acts 1891, p. 324. In force March 6, 1891.)

4295. All persons may pay by installments. 1.

4296. Street and sewer bonds—Lien. 8.

4297. Certificates to contractor—Collecting assessments—Foreclosure. 9. It shall be lawful for such city or incorporated town to provide by ordinance for the issuance of certificates or bonds to contractors, who, under contract with the city, shall have constructed any such inprovement in payment therefor, each of which certificates or bonds shall bear the name of the sewer, street or alley improved, the time the same shall run, not to exceed ten years, the rate of interest the same shall bear, not to exceed six per cent. per annum, payable semi-annually, and such certificates and bonds shall transfer to the contractor and his assigns all the right and interest of such city or town to, in and with respect to every such assessment and the lien thereby created against the property of such owners assessed as shall avail themselves of the provisions of this act to have their assessments paid in installments, and shall authorize such contractor and his assigns to receive, sue for and collect, or have collected, every such assessment embraced in any such certificate or

bond, by or through any of the methods provided by law for the collection of assessments for local improvements, including the provisions of this act. And, if the city or town shall fail, neglect or refuse to pay said certificates or bonds, or to promptly collect any of such assessments when due, the owner of any of such certificates or bonds may proceed in his own name to collect such assessment and foreclose the lien thereof in any court of competent jurisdiction, and shall recover, in addition to the amount of such bonds or certificates and the interest thereon, a reasonable attorney's fee, together with the cost of such suit. Any number of holders of such certificates or bonds for any single improvement may join as plaintiffs, and any number of owners of the property on which the same are a lien, may be joined as defendants in such suit. And such bonds and certificates shall be equal liens upon the property for the assessments represented by such bonds or certificates without priority of one over another to the extent of the several assessments against the several lots and parcels of lands.

4298. Precept for sale—Appeal—Sale and conveyance. 10.
4299. Act not to apply to cities of one hundred thousand. 4.